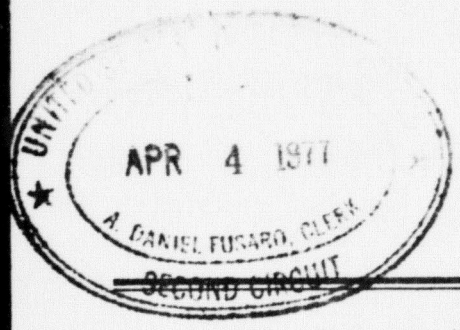
United States Court of Appeals

for the Second Circuit

APPENDIX



76-7591, 77-7016

United States Court of Appeals

FOR THE SECOND CIRCUIT

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN and DALIA KOREN,

Plaintiffs,

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, MORDECHAI MUSCATEL and HAGAI KOREN,

Plaintiffs-Appellants,

v.

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY and NORTH AMERICAN ROCKWELL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020

HALE RUSSELL GRAY SEAMAN
& BIRKETT
122 East 42nd Street
New York, New York 10017

Attorneys for Appellant
Israel Aircraft Industries, Ltd.

FUCHSBERG & FUCHSBERG
250 Broadway
New York, New York 10007

Attorneys for Appellants
Zohar Landau, Mordechai
Muscatel and Hagai Koren

MENDES & MOUNT
27 William Street
New York, New York 10005

Attorneys for Appellees

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	PAGE
Docket Entries	1a
Amended Complaint	5a
Answer of Standard Precision to Amended Complaint	54a
Defendants' Notice for Production of Documents	58a
Defendants' Notice of Taking Depositions	61a
Reply of Plaintiff Israel Aircraft Industries, Ltd. to Counterclaim	64a
Defendants' Interrogatories filed June 18, 1974	65a
Defendants' Notice of Motion to Dismiss the Complaint Pursuant to Rule 37(d) for Failure to Comply with Notice of Taking Depositions	97a
Affidavit of Dennis C. Murphy in Support of Foregoing Motion	98a
Defendants' Notice of Motion to Dismiss the Complaint Pursuant to Rule 37(d) for Failure to Produce Documents and Answer Interrogatories	101a
Affidavit of Dennis C. Murphy in Support of Foregoing Motion	102a
Affidavit of William L. Schierberl in Opposition to Defendants' Motion to Dismiss Complaint	111a
Affidavit of Marshall S. Turner in Opposition to Defendants' Motion to Dismiss Complaint	118a

PAGE

Reply Affidavit of Dennis C. Murphy 125a

Affidavit of William L. Schierberl in Response to Reply Affidavit 131a

Memo Endorsed by Carter, U.S.D.J., dated November 15, 1974, Denying Defendants' Motion to Dismiss Complaint for Failure to Produce Documents 139a

Memo Endorsed by Carter, U.S.D.J., dated November 15, 1974, Denying Defendants' Motion to Dismiss for Failure to Comply with Notice of Taking Depositions 139a

Pre-Trial Order 140a

Defendants' Notice of Motion to Compel Production of Parts for Re-Examination 163a

Affidavit of Dennis C. Murphy in Support of Foregoing Motion 164a

Affidavit of William L. Schierberl in Opposition to Defendants' Motion to Compel Production of Parts for Re-Examination 168a

Memo Endorsed by Carter, U.S.D.J., dated November 12, 1975, Granting Defendants' Motion to Compel Production of Parts for Re-Examination 172a

Defendants' Notice of Motion Pursuant to Rule 56 for Summary Judgment 173a

Affidavit of Dennis C. Murphy in Support of Foregoing Motion 174a

PAGE

Affidavit of William L. Schierberl in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Cross-Motion to Strike Defendants' Defenses 178a

Affidavit of William L. Schierberl in Opposition to Defendants' Motion for a New Trial and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Cross-Motion to Dismiss Defendants' Counterclaims 183a

Notice of Motion of Plaintiff Israel Aircraft Industries, Ltd. for Summary Judgment Dismissing the Defendants' Counter-Claims 195a

Defendants' Notice of Cross-Motion to Amend Answer and for Summary Judgment 196a

Affidavit of Dennis C. Murphy in Support of Foregoing Cross-Motion 197a

Affidavit of Marshall S. Turner Containing Original Releases and Translations 206a

Opinion and Order of the District Court, dated October 26, 1976 ..... 209a

Affidavit of William L. Schierberl Requesting Opportunity to Present Testimony Before the Court 226a

Notice of Motion of Plaintiff Israel Aircraft Industries, Ltd. for Reargument and Reconsideration Pursuant to Local Rule 9 ..... 238a

Notice of Motion of Plaintiff Israel Aircraft Industries, Ltd. Pursuant to F.R.C.P. Rules 59 and 60 and General Local Rules 4 and 9 ..... 240a

PAGE

Affidavit of Selvyn Seidel in Support of Motion 241a

Affidavit of Herzela Ron in Support of Motion 245a

Notice of Motion of Plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren for Reargument and Reconsideration 247a

Affidavit of Norman Leonard Cousins in Support of Motion 249a

Affidavit of Zohar Landau dated November 7, 1976 .... 268a

Affidavit of Mordechai Muscatel dated November 7, 1976 ..... 272a

Affidavit of Hagai Koren dated November 5, 1976 .... 275a

Affidavit of Dennis C. Murphy in Response to Motions 278a

Affidavit of Marshall S. Turner in Support of Motion 280a

Affidavit of Selvyn Seidel in Support of Motion 296a

Affidavit of Herzela Ron in Support of Motion 298a

Affidavit of Norman Leonard Cousins in Support of Motion 313a

Affidavit of William L. Schierberl in Support of Motion 322a

Notice of Appeal of Plaintiff Israel Aircraft Industries, Ltd. from Order of October 26, 1976 ..... 335a

PAGE

Notice of Appeal of Plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren from Order of October 26, 1976 ..... 336a

Opinion and Order of the District Court dated January 4, 1977 ..... 337a

Notice of Appeal of Israel Aircraft Industries, Ltd. from Order of January 4, 1977 ..... 347a

Notice of Appeal of Plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren from Order of January 4, 1977 ..... 348a

Excerpts from Transcript of Document Marking Session on January 10, 1974 ..... 349a

Excerpts from Transcript of Deposition of Zohar Landau 351a

Excerpts from Transcript of Deposition of Mordechai Muscatel 353a

Excerpts from Transcript of Trial 355a

Legal Opinion of Dr. D. Hermann 368a

Docket Entries

DATE	PROCEEDINGS
	* * *
4/19/73	Amended Complaint
	* * *
7/ 6/73	Defendants' Notice of Taking Depositions
	* * *
7/ 6/73	Answer to Amended Complaint
7/ 6/73	Defendants' Notice for Production of Documents
	* * *
7/25/73	Reply of Plaintiff Israel Aircraft Industries, Ltd. to Counterclaim
	* * *
6/18/74	Defendants' Interrogatories
	* * *
9/30/74	Defendants' Notice of Motion to Dismiss the Complaint Pursuant to Rule 37(d) for Failure to Comply with Notice of Taking Depositions and supporting affidavit of Dennis C. Murphy
	* * *
10/ 2/74	Defendants' Notice of Motion to Dismiss the Complaint Pursuant to Rule 37(d) for Failure to Produce Documents and supporting affidavit of Dennis C. Murphy
	* * *
10/ 4/74	Affidavit of William L. Schierberl in Opposition to Defendants' Motion to Dismiss Complaint
	* * *
10/25/74	Reply Affidavit of Dennis C. Murphy
11/ 4/74	Affidavit of William L. Schierberl in Response to Reply Affidavit
	* * *
11/18/74	Affidavit of Marshall S. Turner in Opposition to Defendants' Motion to Dismiss Complaint
	* * *

Docket Entries

DATE	PROCEEDINGS
11/19/74	Memo Endorsed by Carter, U.S.D.J., dated November 15, 1974, Denying Motion to Dismiss Complaint for Failure to Produce Documents
11/19/74	Memo Endorsed by Carter, U.S.D.J., dated November 15, 1974, Denying Defendants' Motion to Dismiss for Failure to Comply with Notice of Taking Depositions
	* * *
1/ 7/75	Pre-Trial Order
	* * *
10/29/75	Defendants' Notice of Motion to Compel Production of Parts for Re-Examination and supporting affidavit of Dennis C. Murphy
	* * *
11/ 7/75	Affidavit of William L. Schierberl in Opposition to Defendants' Motion to Compel Production of Parts for Re-Examination
	* * *
11/17/75	Memo Endorsed by Carter, U.S.D.J., dated November 12, 1975, Granting Defendants' Motion to Compel Production of Parts
	* * *
12/30/75	Defendants' Notice of Motion Pursuant to Rule 56 for Summary Judgment and supporting affidavit of Dennis C. Murphy
	* * *
1/ 6/76	Affidavit of William L. Schierberl in Opposition to Motion for Summary Judgment and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Cross-Motion to Strike Defenses
	* * *
3/ 8/76	Defendants' Notice of Motion for New Trial and Supporting Affidavit of Dennis C. Murphy

Docket Entries

DATE	PROCEEDINGS
3/26/76	Affidavit of William L. Schierberl in Opposition to Motion for a New Trial and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Cross-Motion to Dismiss Defendants' Counterclaims
	* * *
3/30/76	Memo Endorsed by Carter, U.S.D.J., dated March 29, 1976, Denying Defendants' Motion for New Trial
	* * *
3/31/76	Notice of Motion of Plaintiff Israel Aircraft Industries, Ltd. for Summary Judgment Dismissing the Defendants' Counter-Claims
	* * *
4/21/76	Defendants' Notice of Cross-Motion to Amend Answer and for Summary Judgment and supporting affidavit of Dennis C. Murphy
	* * *
10/ 4/76	Affidavit of Marshall S. Turner Containing Original Releases and Translations
10/27/76	Opinion and Order of the District Court, dated October 26, 1976
	* * *
11/ 8/76	Affidavit of William L. Schierberl Requesting Opportunity to Present Testimony
	* * *
11/ 8/76	Notice of Motion of Plaintiff Israel Aircraft Industries, Ltd. for Reargument and Reconsideration Pursuant to Local Rule 9
11/ 8/76	Notice of Motion of Israel Aircraft Industries, Ltd. Pursuant to F.R.C.P. Rules 59 and 60 and General Local Rules 4 and 9 and supporting affidavits of Selvyn Seidel and Herzela Ron

Docket Entries

DATE	PROCEEDINGS
11/ 8/76	Notice of Motion of Plaintiff Crewmembers for Reargument and Reconsideration and supporting affidavit of Norman Leonard Cousins
	* * *
11/11/76	Affidavit of Zohar Landau, November 7, 1976
11/12/76	Affidavit of Mordechai Muscatel, November 7, 1976
11/12/76	Affidavit of Dennis C. Murphy in Opposition to Motions
11/16/76	Affidavit of Hagai Koren, November 5, 1976
	* * *
11/17/76	Affidavit of Marshall S. Turner in Support of Motion
	* * *
11/18/76	Affidavit of Selvyn Seidel in Support of Motion
11/18/76	Affidavit of Herzela Ron in Support of Motion
11/19/76	Affidavit of Norman Leonard Cousins in Support of Motion
11/19/76	Affidavit of William L. Schierberl in Support of Motion
11/24/76	Notice of Appeal of Plaintiff Israel Aircraft Industries, Ltd. from Order of October 26, 1976
12/ 7/76	Notice of Appeal of Plaintiff Crewmembers from Order of October 26, 1976
1/ 5/77	Opinion and Order of the District Court, dated January 4, 1977
1/12/77	Notice of Appeal of Israel Aircraft Industries, Ltd. from Order of January 4, 1977
1/21/77	Notice of Appeal of Plaintiff Crewmembers from Order of January 4, 1977

Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 72 Civ. 5359

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN, and DALIA KOREN,

Plaintiffs,

—against—

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY, and NORTH AMERICAN ROCKWELL CORPORATION,

Defendants.

Plaintiffs Demand A Trial By Jury

Plaintiffs, Israel Aircraft Industries, Ltd., Zohar Landau, Nira Landau, Mordechai Muscatel, Zila Muscatel, Hagai Koren, and Dalia Koren, complaining of defendants, allege:

First Claim for Relief on Behalf of Plaintiff Israel Aircraft Industries, Ltd.

1. Plaintiff Israel Aircraft Industries, Ltd. at all times mentioned in this Complaint was and is a corporation organized and existing under and by virtue of the laws of the State of Israel and has its principal place of business at LOD Airport in Israel.

2. Plaintiff Zohar Landau and his wife plaintiff Nira Landau at all times mentioned in this Complaint were and still are residents of the State of Israel.

3. Plaintiff Mordechai Muscatel and his wife plaintiff Zila Muscatel at all times mentioned in this Complaint were and still are residents of the State of Israel.

4. Plaintiff Hagai Koren and his wife plaintiff Dalia Koren at all times mentioned in this Complaint were and still are residents of the State of Israel.

5. Upon information and belief, defendant Standard Precision, Inc. was a corporation incorporated under the laws of the State of Kansas and had its principal place of business in the State of Kansas.

6. Upon information and belief, defendant Standard Precision, Inc. became a division of Electronic Communications, Inc. on September 30, 1965, and thereafter carried on its business and became known as Standard Precision A Division of Electronic Communications, Inc. (hereafter Standard Precision).

7. Upon information and belief, defendant Electronic Communications, Inc., subsequently acquired by merger defendant Standard Precision and thereby or otherwise assumed the liabilities, obligations and penalties of Standard Precision.

8. Upon information and belief, defendant Electronic Communications, Inc. at all times mentioned in this Complaint was and is a corporation incorporated under the laws of the State of New Jersey and has its principal place of business in the State of Florida.

9. Upon information and belief, defendant Electronic Communications, Inc. at all times mentioned in this Complaint was and is doing business in the State of New York.

10. Upon information and belief, defendant The National Cash Register Company, subsequently acquired by merger defendant Electronic Communications, Inc. and thereby or otherwise assumed the liabilities, obligations and penalties of Electronic Communications, Inc.

11. Upon information and belief, defendant The National Cash Register Company at all times mentioned in this Complaint was and is a corporation incorporated under the laws of the State of Maryland and has its principal place of business in the State of Ohio.

12. Upon information and belief, defendant The National Cash Register Company presented to the Secretary of State of the State of New York the necessary statement and designation with a copy of its certificate of incorporation duly certified, and procured from the said Secretary of State a certificate of authority stating among other things that the defendant The National Cash Register Company is authorized to do business in the State of New York which authorization, at all times mentioned in this Complaint was and is maintained by defendant The National Cash Register Company.

13. Upon information and belief, defendant North American Rockwell Corporation at all times mentioned in this Complaint was and is a corporation incorporated under the laws of the State of Delaware and has its principal place of business in the State of Pennsylvania.

14. Upon information and belief, defendant North American Rockwell Corporation presented to the Secretary of State of the State of New York the necessary statement and designation with a copy of its certificate of incorporation duly certified, and procured from the said Secretary of State a certificate of authority stating among other things that the defendant North American Rockwell Corporation is authorized to do business in the State of New York which authorization, at all times mentioned in this Complaint was and is maintained by defendant North American Rockwell Corporation.

15. This is a civil action wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

16. Jurisdiction of the Court is invoked under §28 U.S.C. 1332 (a) (2).

17. Plaintiff Israel Aircraft Industries, Ltd. at all times mentioned in this Complaint was and is engaged in the manufacture and sale of aircraft.

18. Upon information and belief, defendant Standard Precision at all times mentioned in this Complaint was and is engaged in the manufacture and sale of aircraft components.

19. Upon information and belief, at all times mentioned in this Complaint defendant North American Rockwell Corporation (hereafter North American Rockwell) was and is engaged in the business of the manufacture and sale of aircraft and aircraft components.

20. Plaintiff Israel Aircraft Industries, Ltd. (hereafter Israel Aircraft) at all times mentioned in this Complaint was a party to agreements with North American Rockwell, whereby North American Rockwell agreed to sell to Israel Aircraft certain aircraft and parts to be used in the construction and fabrication of aircraft of the same type and as spare parts therefor.

21. On February 13, 1969, plaintiff Israel Aircraft, pursuant to the provisions of its agreement with North American Rockwell and in partial performance thereof, took delivery and title to a certain North American Rockwell Model No. 1121 Aero Commander aircraft (hereafter the Aircraft) bearing Serial Number 29.

22. Upon information and belief, defendant Standard Precision manufactured a certain aircraft Wing Flap System including inboard and outboard Wing Flap Actuator Assemblies bearing North American Rockwell Specification Numbers 6193044-501 and 6193044-1 respectively and Standard Precision Part Numbers 1103572 and 1103573 respectively and both bearing Serial Numbers 127.

23. On or about July 9, 1969, defendant North American Rockwell, pursuant to its agreement with Israel Aircraft, sold to Israel Aircraft aircraft Wing Flap Systems including inboard and outboard Wing Flap Actuator Assemblies bearing North American Rockwell Specification Numbers 6193044-501 and 6193044-1 respectively and Standard Precision Part Numbers 1103572 and 1103573 respectively and both bearing Serial Numbers 127.

24. On or about January 9, 1970, plaintiff Israel Aircraft installed aircraft Wing Flap Systems including inboard and outboard Wing Flap Actuator Assemblies bearing

North American Rockwell Specification Numbers 6193044-501 and 6193044-1 respectively and Standard Precision Part Numbers 1103572 and 1103573 respectively and both bearing Serial Numbers 127 (hereafter Wing Flap Systems) upon the Aircraft.

25. On January 21, 1970, the Aircraft was being test flown by the plaintiff Israel Aircraft as part of a program for type certification by the United States Federal Aviation Administration and the Israel Civil Aviation Administration.

26. On January 21, 1970, plaintiff Zohar Landau was a member of the crew of the Aircraft and was in the employ of plaintiff Israel Aircraft.

27. On January 21, 1970, plaintiff Mordechai Muscatel was a member of the crew of the Aircraft and was in the employ of plaintiff Israel Aircraft.

28. On January 21, 1970, plaintiff Hagai Koren was a member of the crew of the Aircraft and was in the employ of plaintiff Israel Aircraft.

29. On January 21, 1970, during in-flight maneuvers required by the type certification program, the Aircraft flap system malfunctioned due to defects in material, workmanship and design of the Wing Flap Systems.

30. Following the functional failure of the Wing Flap Systems and after all efforts to correct the condition had failed, the crew was forced to abandon the Aircraft.

31. The functional failure of the Wing Flap Systems necessitated the abandonment of the Aircraft and caused

the subsequent crash near Kalkilia, Israel, which totally destroyed the Aircraft and resulted in damages to plaintiffs as hereinafter more specifically described.

32. Defendants Standard Precision and North American Rockwell and each of them manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold the Wing Flap Systems.

33. Defendants Standard Precision and North American Rockwell and each of them knew, or in the exercise of reasonable care should have known, that the aforesaid Wing Flap Systems were products of such a nature that if they were not properly manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold for the use and purposes for which they were intended they would constitute defective and dangerous products of imminent danger to the users thereof.

34. Defendants Standard Precision and North American Rockwell and each of them negligently manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold the Wing Flap Systems which were defective in material, workmanship and design and, as a result thereof, were dangerous products and unsafe for the use and purposes for which they were intended when used, installed and applied as recommended by defendants Standard Precision and North American Rockwell.

35. Defendants Standard Precision and North American Rockwell and each of them knew, or in the exercise of reasonable care should have known and discovered, the defective character of the Wing Flap Systems and that they were unsafe when used, installed and applied as recommended by defendants Standard Precision and North American Rockwell and each of them.

36. The defective character of the Wing Flap Systems was not made known to the plaintiff Israel Aircraft by defendants Standard Precision and North American Rockwell or either of them.

37. On January 21, 1970, while plaintiff Irsael Aircraft was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Israel Aircraft was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the negligence hereinabove alleged.

38. Solely as a result thereof, plaintiff Israel Aircraft suffered the loss of the Aircraft and loss, damage and destruction of property and technical equipment on board the Aircraft, all to its damage in the sum of One Million ($1,000,000.00) Dollars.

Second Claim for Relief on Behalf of
Plaintiff Israel Aircraft Industries, Ltd.

39. Plaintiff Israel Aircraft repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

40. Defendants Standard Precision and North American Rockwell and each of them at the time of said sale, and as a part thereof, and as an inducement to plaintiff Israel Aircraft to purchase said Wing Flap Systems, expressly warranted to plaintiff Israel Aircraft that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials and workmanship and fit for the purposes for which they were intended.

41. Defendants Standard Precision and North American Rockwell and each of them held themselves out to the plaintiff Israel Aircraft as possessing superior knowledge and skill in the manufacture, compounding, planning, designing, processing, assembly, testing, construction, fabrication, modification, analysis, recommendation, merchandising, advertising, promotion, distribution, inspection and sale of the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof.

42. Plaintiff Israel Aircraft in purchasing and using the Wing Flap Systems relied upon the aforementioned express warranties and upon the aforesaid superior knowledge and skill of defendants Standard Precision and North American Rockwell and each of them.

43. Plaintiff Israel Aircraft in so purchasing and using the Wing Flap Systems had no means of discovering any defects or dangers in the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

44. Defendants Standard Precision and North American Rockwell, or either of them, did not recommend or suggest any inspection procedure for the Wing Flap Systems which would lead to the discovery of any defect in manufacture, design or material, of the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

45. On January 21, 1970, the Wing Flap Systems were being used in the manner and for the purpose intended by defendants Standard Precision and North American Rockwell and each of them.

46. Defendants Standard Precision and North American Rockwell and each of them breached the aforesaid express warranties in that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were not manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials and workmanship and fit for the purpose for which they were intended.

47. Plaintiff Israel Aircraft thereafter gave due notice to defendants Standard Precision and North American Rockwell and each of them of the breach of the aforesaid express warranties.

48. On January 21, 1970, while plaintiff Israel Aircraft was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Israel Aircraft was caused to sustain damages as hereinafter alleged which were the direct and proximate result

of the breach of the aforesaid express warranties as hereinabove alleged.

49. As a result thereof, plaintiff Israel Aircraft suffered the loss of the Aircraft and loss, damage and destruction of property and technical equipment on board the Aircraft, all to its damage in the sum of One Million ($1,000,000.00) Dollars.

Third Claim for Relief on Behalf of Plaintiff Israel Aircraft Industries, Ltd.

50. Plaintiff Israel Aircraft repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

51. Defendants Standard Precision and North American Rockwell and each of them impliedly warranted to plaintiff Israel Aircraft that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were free from any and all defects in material, workmanship and design, were of merchantable quality, airworthy and fit for the particular uses and purposes for which they were manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold.

52. Defendants Standard Precision and North American Rockwell and each of them held themselves out to the public including plaintiff Israel Aircraft and all purchasers and users of their aircraft Wing Flap Systems, including the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, as

possessing superior knowledge and skill in the manufacture, compounding, planning, designing, processing, assembly, testing, construction, fabrication, modification, analysis, recommendation, merchandising, advertising, promotion, distribution, inspection and sale of aircraft Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof.

53. Plaintiff Israel Aircraft in purchasing and using the Wing Flap Systems relied upon the aforementioned implied warranties and upon the aforesaid superior knowledge and skill of defendants Standard Precision and North American Rockwell and each of them.

54. Plaintiff Israel Aircraft in so purchasing and using the Wing Flap Systems had no means of discovering any defects or dangers in the Wing Flap Systems or the materials used in the fabrication thereof, or the parts, systems and components thereof.

55. Defendants Standard Precision and North American Rockwell, or either of them, did not recommend or suggest any inspection procedure for the Wing Flap Systems which would lead to the discovery of any defect in manufacture, design or material of the Wing Flap Systems or the materials used in the fabrication thereof, or the parts, systems and components thereof.

56. On January 21, 1970, the Wing Flap Systems were being used in the manner and for the purpose intended by defendants Standard Precision and North American Rockwell and each of them.

57. Defendants Standard Precision and North American Rockwell and each of them breached the aforesaid implied

warranties in that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were not manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials, workmanship and design of merchantable quality, airworthy and fit for the purpose for which they were intended.

58. Plaintiff Israel Aircraft thereafter gave due notice to defendants Standard Precision and North American Rockwell and each of them of the breach of the aforesaid implied warranties.

59. On January 21, 1970, while plaintiff Israel Aircraft was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Israel Aircraft was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the breach of the aforesaid implied warranties as hereinabove alleged.

60. As a result thereof, plaintiff Israel Aircraft suffered the loss of the Aircraft and loss, damage and destruction of property and technical equipment on board the Aircraft, all to its damage in the sum of One Million ($1,000,000.00) Dollars.

Fourth Claim for Relief on Behalf of Plaintiff Zohar Landau

61. Plaintiff Zohar Landau repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

62. Defendants Standard Precision and North American Rockwell and each of them manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold the Wing Flap Systems.

63. Defendants Standard Precision and North American Rockwell and each of them knew, or in the exercise of reasonable care should have known, that the aforesaid Wing Flap Systems were products of such a nature that if they were not properly manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold for the use and purposes for which they were intended they would constitute defective and dangerous products of imminent danger to the users thereof.

64. Defendants Standard Precision and North American Rockwell and each of them negligently manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold the Wing Flap Systems which were defective in material, workmanship and design and, as a result thereof, were dangerous products and unsafe for the use and purpose for which they were intended when used, installed and applied as recommended by defendants Standard Precision and North American Rockwell and each of them.

65. Defendants Standard Precision and North American Rockwell and each of them knew, or in the exercise of rea-

sonable care should have known and discovered, the defective character of the Wing Flap Systems and that they were unsafe when used, installed and applied as recommended by defendants Standard Precision and North American Rockwell and each of them.

66. The defective character of the Wing Flap Systems were not made known to plaintiffs Zohar Landau and Israel Aircraft by defendants Standard Precision and North American Rockwell or either of them.

67. On January 21, 1970, while plaintiff Zohar Landau was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Zohar Landau was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the negligence hereinabove alleged.

68. At the aforesaid time and place plaintiff Zohar Landau sustained injuries to his head, limbs and body, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and upon information and belief some of these injuries are of a permanent and lasting nature; that plaintiff has been hospitalized and confined to bed and home as a result thereof, has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines as a direct and proximate result of the negligence hereinabove alleged.

69. Solely as a result thereof, plaintiff Zohar Landau has been damaged in the sum of Five Hundred Thousand ($500,000.00) Dollars.

Fifth Claim for Relief on Behalf of Plaintiff Zohar Landau

70. Plaintiff Zohar Landau repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

71. Defendants Standard Precision and North American Rockwell and each of them at the time of said sale, and as a part thereof, and as an inducement to plaintiff Zohar Landau's employer, plaintiff Israel Aircraft, to purchase said Wing Flap Systems, expressly warranted to plaintiff Zohar Landau's said employer that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials and workmanship and fit for the purposes for which they were intended.

72. Defendants Standard Precision and North American Rockwell and each of them held themselves out to the plaintiff Zohar Landau's employer, plaintiff Israel Aircraft, as possessing superior knowledge and skill in the manufacture, compounding, planning, designing, processing, assembly, testing, construction, fabrication, modification, analysis, recommendation, merchandising, advertising, promotion, distribution, inspection and sale of the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof.

73. Plaintiff Zohar Landau's employer, plaintiff Israel Aircraft, in purchasing and using the Wing Flap Systems relied upon the aforementioned express warranties and upon the aforesaid superior knowledge and skill of defendants Standard Precision and North American Rockwell and each of them.

74. Plaintiff Zohar Landau's employer, plaintiff Israel Aircraft, in so purchasing and using the Wing Flap Systems had no means of discovering any defects or dangers in the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

75. Defendants Standard Precision and North American Rockwell, or either of them, did not recommend or suggest any inspection procedure for the Wing Flap Systems which would lead to the discovery of any defect in manufacture, design or material of the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

76. On January 21, 1970, the Wing Flap Systems were being used in the manner and for the purpose intended by defendants Standard Precision and North American Rockwell and each of them.

77. Defendants Standard Precision and North American Rockwell and each of them breached the aforesaid express warranties in that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were not manufactured in accordance with the appropriate plans, specifications and type design,

free from defects in materials and workmanship and fit for the purpose for which they were intended.

78. On January 21, 1970, while plaintiff Zohar Landau was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Zohar Landau was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the breach of the aforesaid express warranties as hereinabove alleged.

79. At the aforesaid time and place plaintiff Zohar Landau sustained injuries to his head, limbs and body, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and upon information and belief some of these injuries are of a permanent and lasting nature; that plaintiff has been hospitalized and confined to bed and home as a result thereof, has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines as a direct and proximate result of the breach of the aforesaid express warranties as hereinabove alleged.

80. As a result thereof, plaintiff Zohar Landau has been damaged in the sum of Five Hundred Thousand ($500,000.00) Dollars.

Amended Complaint

Sixth Claim for Relief on Behalf of Plaintiff Zohar Landau

81. Plaintiff Zohar Landau repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

82. Defendants Standard Precision and North American Rockwell and each of them impliedly warranted to plaintiff Zohar Landau that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were free from any and all defects in material, workmanship and design, were of merchantable quality, airworthy and fit for the particular uses and purposes for which they were manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold.

83. Defendants Standard Precision and North American Rockwell and each of them held themselves out to the public including plaintiff Zohar Landau and all purchasers and users of their aircraft Wing Flap Systems, including the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, as possessing superior knowledge and skill in the manufacture, compounding, planning, designing, processing, assembly, testing, construction, fabrication, modification, analysis, recommendation, merchandising, advertising, promotion, distribution, inspection and sale of aircraft Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof.

84. Plaintiff Zohar Landau in using the Wing Flap Systems relied upon the aforementioned implied warranties and upon the aforesaid superior knowledge and skill of defendants Standard Precision and North American Rockwell and each of them.

85. Plaintiff Zohar Landau in so using the Wing Flap Systems had no means of discovering any defects or dangers in the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

86. Defendants Standard Precision and North American Rockwell, or either of them, did not recommend or suggest any inspection procedure for the Wing Flap Systems which would lead to the discovery of any defect in manufacture, design or material of the Wing Flap Systems or the materials used in the fabrication thereof, or the parts, systems and components thereof.

87. On January 21, 1970, the Wing Flap Systems were being used in the manner and for the purpose intended by defendants Standard Precision and North American Rockwell and each of them.

88. Defendants Standard Precision and North American Rockwell and each of them breached the aforesaid implied warranties in that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were not manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials, workmanship and design, of merchantable quality, airworthy and fit for the purpose for which they were intended.

89. On January 21, 1970, while plaintiff Zohar Landau was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Zohar Landau was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the breach of the aforesaid implied warranties as hereinabove alleged.

90. At the aforesaid time and place plaintiff Zohar Landau sustained injuries to his head, limbs and body, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and upon information and belief some of these injuries are of a permanent and lasting nature; that plaintiff has been hospitalized and confined to bed and home as a result thereof, has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines as a direct and proximate result of the breach of the aforesaid implied warranties as hereinabove alleged.

91. As a result thereof, plaintiff Zohar Landau has been damaged in the sum of Five Hundred Thousand ($500,000.00) Dollars.

Seventh Claim for Relief on Behalf of Plaintiff Nira Landau

92. Plaintiff Nira Landau, repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 and 62 through 68 of this Complaint as if herein set forth in full.

93. At all times hereinbefore and hereinafter mentioned, plaintiff Nira Landau was and still is the wife of plaintiff Zohar Landau, resided with him and was entitled to his consortium, including his support, services, society and companionship.

94. As a direct and proximate result of the aforesaid negligence and resultant injuries to the plaintiff Zohar Landau, plaintiff Nira Landau has been deprived of her husband's consortium, including his support, services, society and companionship.

95. Solely as a result thereof, plaintiff Nira Landau has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

Eighth Claim for Relief on Behalf of Plaintiff Nira Landau

96. Plaintiff Nira Landau repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 and 71 through 79 of this Complaint as if herein set forth in full.

97. At all times hereinbefore and hereinafter mentioned, plaintiff Nira Landau was and still is the wife of plaintiff Zohar Landau, resided with him and was entitled to his consortium, including his support, services, society and companionship.

98. As a direct and proximate result of the breach of the aforesaid express warranties and resultant injuries to the plaintiff Zohar Landau, plaintiff Nira Landau has been deprived of her husband's consortium, including his support, services, society and companionship.

99. As a result thereof, plaintiff Nira Landau has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

Ninth Claim for Relief on Behalf of Plaintiff Nira Landau

100. Plaintiff Nira Landau repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 and 82 through 90 of this Complaint as if herein set forth in full.

101. At all times hereinbefore and hereinafter mentioned, plaintiff Nira Landau was and still is the wife of plaintiff Zohar Landau, resided with him and was entitled to his consortium, including his support, services, society and companionship.

102. As a direct and proximate result of the breach of the aforesaid implied warranties and resultant injuries to the plaintiff Zohar Landau, plaintiff Nira Landau has been deprived of her husband's consortium, including his support, services, society and companionship.

103. As a result thereof, plaintiff Nira Landau has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

Tenth Claim for Relief on Behalf of Plaintiff Mordechai Muscatel

104. Plaintiff Mordechai Muscatel repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

105. Defendants Standard Precision and North American Rockwell and each of them manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold the Wing Flap Systems.

106. Defendants Standard Precision and North American Rockwell and each of them knew, or in the exercise of reasonable care should have known, that the aforesaid Wing Flap Systems were products of such a nature that if they were not properly manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold for the use and purpose for which they were intended they would constitute defective and dangerous products of imminent danger to the users thereof.

107. Defendants Standard Precision and North American Rockwell and each of them negligently manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold the Wing Flap Systems which were defective in materials, workmanship and design and, as a result thereof, were dangerous products and unsafe for the use and purpose for which they were intended when used, installed and applied as recommended by defendants Standard Precision and North American Rockwell and each of them.

108. Defendants Standard Precision and North American Rockwell and each of them knew, or in the exercise

of reasonable care should have known and discovered, the defective character of the Wing Flap Systems and that they were unsafe when used, installed and applied as recommended by defendants Standard Precision and North American Rockwell and each of them.

109. The defective character of the Wing Flap Systems was not made known to plaintiffs Mordechai Muscatel and Israel Aircraft by defendants Standard Precision and North American Rockwell or either of them.

110. On January 21, 1970, while plaintiff Mordechai Muscatel was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Mordechai Muscatel was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the negligence hereinabove alleged.

111. At the aforesaid time and place plaintiff Mordechai Muscatel sustained injuries to his head, limbs and body, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and upon information and belief some of these injuries are of a permanent and lasting nature; that plaintiff has been hospitalized and confined to bed and home as a result thereof, has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines as a direct and proximate result of the negligence herein above alleged.

112. Solely as a result thereof, plaintiff Mordechai Muscatel has been damaged in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Eleventh Claim for Relief on Behalf of Plaintiff Mordechai Muscatel

113. Plaintiff Mordechai Muscatel repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

114. Defendants Standard Precision and North American Rockwell and each of them at the time of said sale, and as a part thereof, and as an inducement to plaintiff Mordechai Muscatel's employer, plaintiff Israel Aircraft, to purchase said Wing Flap Systems, expressly warranted to plaintiff Mordechai Muscatel's said employer that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials and workmanship and fit for the purpose for which they were intended.

115. Defendants Standard Precision and North American Rockwell and each of them held themselves out to the plaintiff Mordechai Muscatel's employer, plaintiff Israel Aircraft, as possessing superior knowledge and skill in the manufacture, compounding, planning, designing, processing, assembly, testing, construction, fabrication, modification, analysis, recommendation, merchandising, advertising, promotion, distribution, inspection and sale of the

Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof.

116. Plaintiff Mordechai Muscatel's employer, plaintiff Israel Aircraft, in purchasing and using the Wing Flap Systems relied upon the aforementioned express warranties and upon the aforesaid superior knowledge and skill of defendants Standard Precision and North American Rockwell and each of them.

117. Plaintiff Mordechai Muscatel's employer, plaintiff Israel Aircraft, in so purchasing and using the Wing Flap Systems had no means of discovering any defects or dangers in the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

118. Defendants Standard Precision and North American Rockwell, or either of them, did not recommend or suggest any inspection procedure for the Wing Flap Systems which would lead to the discovery of any defect in manufacture, design or material of the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

119. On January 21, 1970, the Wing Flap Systems were being used in the manner and for the purpose intended by defendants Standard Precision and North American Rockwell and each of them.

120. Defendants Standard Precision and North American Rockwell and each of them breached the aforesaid express warranties in that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, sys-

tems and components thereof, were not manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials and workmanship and fit for the purpose for which they were intended.

121. On January 21, 1970, while plaintiff Mordechai Muscatel was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Mordechai Muscatel was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the breach of the aforesaid express warranties as hereinabove alleged.

122. At the aforesaid time and place plaintiff Mordechai Muscatel sustained injuries to his head, limbs and body, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and upon information and belief some of these injuries are of a permanent and lasting nature; that plaintiff has been hospitalized and confined to bed and home as a result thereof, has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines as a direct and proximate result of the negligence hereinabove alleged.

123. As a result thereof, plaintiff Mordechai Muscatel has been damaged in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Amended Complaint

Twelfth Claim for Relief on Behalf of Plaintiff Mordechai Muscatel

124. Plaintiff Mordechai Muscatel repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

125. Defendants Standard Precision and North American Rockwell and each of them impliedly warranted to plaintiff Mordechai Muscatel that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were free from any and all defects in material, workmanship and design, were of merchantable quality, airworthy and fit for the particular use and purpose for which they were manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold.

126. Defendants Standard Precision and North American Rockwell and each of them held themselves out to the public including plaintiff Mordechai Muscatel and all purchasers and users of their aircraft Wing Flap Systems, including the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, as possessing superior knowledge and skill in the manufacture, compounding, planning, designing, processing, assembly, testing, construction, fabrication, modification, analysis, recommendation, merchandising, advertising, promotion, distribution, inspection and sale of aircraft Wing Flap Systems, the materials used in the

fabrication thereof, and all parts, systems and components thereof.

127. Plaintiff Mordechai Muscatel in using the Wing Flap Systems relied upon the aforementioned implied warranties and upon the aforesaid superior knowledge and skill of defendants Standard Precision and North American Rockwell and each of them.

128. Plaintiff Mordechai Muscatel in so using the Wing Flap Systems had no means of discovering any defects or dangers in the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

129. Defendants Standard Precision and North American Rockwell, or either of them, did not recommend or suggest any inspection procedure for the Wing Flap Systems which would lead to the discovery of any defect in manufacture, design or material of the Wing Flap Systems or the materials used in the fabrication thereof, or the parts, systems and components thereof.

130. On January 21, 1970, the Wing Flap Systems were being used in the manner and for the purpose intended by Standard Pr sion and North American Rockwell.

131. Defendants Standard Precision and North American Rockwell and each of them breached the aforesaid implied warranties in that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were not manufactured in accordance with the appropriate plans, specifications and

type design, free from defects in materials and workmanship and fit for the purpose for which they were intended.

132. On January 21, 1970, while plaintiff Mordechai Muscatel was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Mordechai Muscatel was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the breach of the aforesaid implied warranties as hereinabove alleged.

133. At the aforesaid time and place plaintiff Mordechai Muscatel sustained injuries to his head, limbs and body, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and upon information and belief some of these injuries are of a permanent and lasting nature; that plaintiff has been hospitalized and confined to bed and home as a result thereof, has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines as a direct and proximate result of the negligence hereinabove alleged.

134. As a result thereof, plaintiff Mordechai Muscatel has been damaged in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Thirteenth Claim for Relief on Behalf of Plaintiff Zila Muscatel

135. Plaintiff Zila Muscatel repeats, reiterates and realleges each and every allegation contained in paragraphs

1 through 31 and 105 through 111 of this Complaint as if herein set forth in full.

136. At all times hereinbefore and hereinafter mentioned, plaintiff Zila Muscatel was and still is the wife of plaintiff Mordechai Muscatel, resided with him and was entitled to his consortium, including his support, services, society and companionship.

137. As a direct and proximate result of the aforesaid negligence and resultant injuries to the plaintiff Mordechai Muscatel, plaintiff Zila Muscatel has been deprived of her husband's consortium, including his support, services, society and companionship.

138. Solely as a result thereof, plaintiff Zila Muscatel has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

Fourteenth Claim for Relief on Behalf of Plaintiff Zila Muscatel

139. Plaintiff Zila Muscatel repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 and 114 through 122 of this Complaint as if herein set forth in full.

140. At all times hereinbefore and hereinafter mentioned, plaintiff Zila Muscatel was and still is the wife of plaintiff Mordechai Muscatel, resided with him and was entitled to his consortium, including his support, services, society and companionship.

141. As a direct and proximate result of the breach of the aforesaid express warranties and resultant injuries to the plaintiff Mordechai Muscatel, plaintiff Zila Muscatel has been deprived of her husband's consortium, including his support, services, society and companionship.

142. As a result thereof, plaintiff Zila Muscatel has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

***Fifteenth** Claim for Relief on Behalf of Plaintiff Zila Muscatel*

143. Plaintiff Zila Muscatel repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 and 125 through 133 of this Complaint as if herein set forth in full.

144. At all times hereinbefore and hereinafter mentioned, plaintiff Zila Muscatel was and still is the wife of plaintiff Mordechai Muscatel, resided with him and was entitled to his consortium, including his support, services, society and companionship.

145. As a direct and proximate result of the breach of the aforesaid implied warranties and resultant injuries to the plaintiff Mordechai Muscatel, plaintiff Zila Muscatel has been deprived of her husband's consortium, including his support, services, society and companionship.

146. As a result thereof, plaintiff Zila Muscatel has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

Amended Complaint

Sixteenth Claim for Relief on Behalf of Plaintiff Hagai Koren

147. Plaintiff Hagai Koren repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

148. Defendants Standard Precision and North American Rockwell and each of them manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold the Wing Flap Systems.

149. Defendants Standard Precision and North American Rockwell and each of them knew, or in the exercise of reasonable care should have known, that the aforesaid Wing Flap Systems were products of such a nature that if they were not properly manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold for the use and purposes for which they were intended they would constitute defective and dangerous products of imminent danger to the users thereof.

150. Defendants Standard Precision and North American Rockwell and each of the negligently manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold the Wing Flap Systems which were defective in materials, workmanship and design and, as a result thereof, were dangerous products and unsafe for the

use and purpose for which they were intended when used, installed and applied as recommended by defendants Standard Precision and North American Rockwell and each of them.

151. Defendants Standard Precision and North American Rockwell and each of them knew, or in the exercise of reasonable care should have known and discovered, the defective character of the Wing Flap Systems and that they were unsafe when used, installed and applied as recommended by defendants Standard Precision and North American Rockwell and each of them.

152. The defective character of the Wing Flap Systems was not made known to plaintiffs Hagai Koren and Israel Aircraft by defendants Standard Precision and North American Rockwell or either of them.

153. On January 21, 1970, while plaintiff Hagai Koren was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Hagai Koren was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the negligence hereinabove alleged.

154. At the aforesaid time and place plaintiff Hagai Koren sustained injuries to his head, limbs and body, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and upon information and belief some of these injuries are of a permanent

and lasting nature; that plaintiff has been hospitalized and confined to bed and home as a result thereof, has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines as a direct and proximate result of the negligence hereinabove alleged.

155. Solely as a result thereof, plaintiff Hagai Koren has been damaged in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Seventeenth Claim for Relief on Behalf of Plaintiff Hagai Koren

156. Plaintiff Hagai Koren repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

157. Defendants Standard Precision and North American Rockwell and each of them at the time of said sale, and as a part thereof, and as an inducement to plaintiff Hagai Koren's employer, plaintiff Israel Aircraft, to purchase said Wing Flap Systems, expressly warranted to plaintiff Hagai Koren's said employer that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials and workmanship and fit for the purposes for which they were intended.

158. Defendants Standard Precision and North American Rockwell and each of them held themselves out to the

plaintiff Hagai Koren's employer, plaintiff Israel Aircraft, as possessing superior knowledge and skill in the manufacture, compounding, planning, designing, processing, assembly, testing, construction, fabrication, modification, analysis, recommendation, merchandising, advertising, promotion, distribution, inspection and sale of the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof.

159. Plaintiff Hagai Koren's employer, plaintiff Israel Aircraft, in purchasing and using the Wing Flap Systems relied upon the aforementioned express warranties and upon the aforesaid superior knowledge and skill of defendants Standard Precision and North American Rockwell and each of them.

160. Plaintiff Hagai Koren's employer, plaintiff Israel Aircraft, in so purchasing and using the Wing Flap Systems had no means of discovering any defects or dangers in the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

161. Defendants Standard Precision and North American Rockwell, or either of them, did not recommend or suggest any inspection procedure for the Wing Flap Systems which would lead to the discovery of any defect in manufacture, design or material of the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

162. On January 21, 1970, the Wing Flap Systems were being used in the manner and for the purpose intended by defendants Standard Precision and North American Rockwell and each of them.

163. Defendants Standard Precision and North American Rockwell and each of them breached and aforesaid express warranties in that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were not manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials and workmanship and fit for the purpose for which they were intended.

164. On January 21, 1970, while plaintiff Hagai Koren was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Hagai Koren was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the breach of the aforesaid express warranties as hereinabove alleged.

165. At the aforesaid time and place plaintiff Hagai Koren sustained injuries to his head, limbs and body, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and upon information and belief some of these injuries are of a permanent and lasting nature; that plaintiff has been hospitalized and confined to bed and home as a result thereof, has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines as a direct and proximate result of the breach of the aforesaid express warranties as hereinabove alleged.

166. As a result thereof, plaintiff Hagai Koren has been damaged in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Eighteenth Claim for Relief on Behalf of Plaintiff Hagai Koren

167. Plaintiff Hagai Koren repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 of this Complaint as if herein set forth in full.

168. Defendants Standard Precision and North American Rockwell and each of them impliedly warranted to plaintiff Hagai Koren that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, were free from any and all defects in material, workmanship and design, were of merchantable quality, airworthy and fit for the particular uses and purposes for which they were manufactured, compounded, planned, designed, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandised, advertised, promoted, distributed, inspected and sold.

169. Defendants Standard Precision and North American Rockwell and each of them held themselves out to the public including plaintiff Hagai Koren and all purchasers and users of their aircraft Wing Flap Systems, including the Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof, as possessing superior knowledge and skill in the manufacture, compounding, planning, designing, processing, assembly, testing, construction, fabrication, modification, analysis, recommendation, merchandising, advertising,

promotion, distribution, inspection and sale of aircraft Wing Flap Systems, the materials used in the fabrication thereof, and all parts, systems and components thereof.

170. Plaintiff Hagai Koren in using the Wing Flap Systems relied upon the aforementioned implied warranties and upon the aforesaid superior knowledge and skill of defendants Standard Precision and North American Rockwell and each of them.

171. Plaintiff Hagai Koren in so using the Wing Flap Systems had no means of discovering any defects or dangers in the Wing Flap Systems, or the materials used in the fabrication thereof, or the parts, systems and components thereof.

172. Defendants Standard Precision and North American Rockwell, or either of them, did not recommend or suggest any inspection procedure for the Wing Flap Systems which would lead to the discovery of any defect in manufacture, design or material of the Wing Flap Systems or the materials used in the fabrication thereof, or the parts, systems and components thereof.

173. On January 21, 1970, the Wing Flap Systems were being used in the manner and for the purpose intended by defendants Standard Precision and North American Rockwell and each of them.

174. Defendants Standard Precision and North American Rockwell and each of them breached the aforesaid implied warranties in that the Wing Flap Systems, the materials used in the fabrication thereof, and all parts,

systems and components thereof, were not manufactured in accordance with the appropriate plans, specifications and type design, free from defects in materials, workmanship and design, of merchantable quality, airworthy and fit for the purpose for which they were intended.

175. On January 21, 1970, while plaintiff Hagai Koren was using the Aircraft and the Wing Flap Systems thereof for the purposes and in the manner for which they were intended to be used by defendants Standard Precision and North American Rockwell and each of them, plaintiff Hagai Koren was caused to sustain damages as hereinafter alleged which were the direct and proximate result of the breach of the aforesaid implied warranties as hereinabove alleged.

176. At the aforesaid time and place plaintiff Hagai Koren sustained injuries to his head, limbs and body, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof, and upon information and belief some of these injuries are of a permanent and lasting nature; that plaintiff has been hospitalized and confined to bed and home as a result thereof, has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines as a direct and proximate result of the breach of the aforesaid implied warranties as hereinabove alleged.

177. As a result thereof, plaintiff Hagai Koren has been damaged in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Nineteenth Claim for Relief on Behalf of Plaintiff Dalia Koren

178. Plaintiff Dalia Koren, repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 and 148 through 154 of this Complaint as if herein set forth in full.

179. At all times hereinbefore and hereinafter mentioned, plaintiff Dalia Koren was and still is the wife of plaintiff Hagai Koren, resided with him and was entitled to his consortium, including his support, services, society and companionship.

180. As a direct and proximate result of the aforesaid negligence and resultant injuries to the plaintiff Hagai Koren, plaintiff Dalia Koren has been deprived of her husband's consortium, including his support, services, society and companionship.

181. Solely as a result thereof, plaintiff Dalia Koren has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

Twentieth Claim for Relief on Behalf of Plaintiff Dalia Koren

182. Plaintiff Dalia Koren repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 and 157 through 165 of this Complaint as if herein set forth in full.

183. At all times hereinbefore and hereinafter mentioned, plaintiff Dalia Koren was and still is the wife of plaintiff Hagai Koren, resided with him and was entitled

to his consortium, including his support, services, society and companionship.

184. As a direct and proximate result of the breach of the aforesaid express warranties and resultant injuries to the plaintiff Hagai Koren, plaintiff Dalia Koren has been deprived of her husband's consortium, including his support, services, society and companionship.

185. As a result thereof, plaintiff Dalia Koren has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

Twenty-first Claim for Relief on Behalf of Plaintiff Dalia Koren

186. Plaintiff Dalia Koren repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 31 and 168 through 176 of this Complaint as if herein set forth in full.

187. At all times hereinbefore and hereinafter mentioned, plaintiff Dalia Koren was and still is the wife of plaintiff Hagai Koren, resided with him and was entitled to his consortium, including his support, services, society and companionship.

188. As a direct and proximate result of the breach of the aforesaid implied warranties and resultant injuries to the plaintiff Hagai Koren, plaintiff Dalia Koren has been deprived of her husband's consortium, including his support, services, society and companionship.

189. As a result thereof, plaintiff Dalia Koren has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

WHEREFORE, plaintiff Israel Aircraft Industries, Ltd. demands judgment:

(1) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the First Claim For Relief in the amount of One Million ($1,000,000.00) Dollars, with interest from January 21, 1970;

(2) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Second Claim For Relief in the amount of One Million ($1,000,000.00) Dollars, with interest from January 21, 1970;

(3) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Third Claim For Relief in the amount of One Million ($1,000,000.00) Dollars, with interest from January 21, 1970;

All together with costs and disbursements of the action.

WHEREFORE, plaintiff Zohar Landau demands judgment:

(1) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Fourth Claim For Relief in the amount of Five Hundred Thousand ($500,000.00) Dollars;

(2) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Fifth Claim For Relief in the amount of Five Hundred Thousand ($500,000.00) Dollars;

(3) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Sixth Claim For Relief in the amount of Five Hundred Thousand ($500,000.00) Dollars;

All together with costs and disbursements of the action.

WHEREFORE, plaintiff Nira Landau demands judgment:

(1) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Seventh Claim For Relief in the amount of Fifty Thousand ($50,000.00) Dollars;

(2) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Eighth Claim For Relief in the amount of Fifty Thousand ($50,000.00) Dollars;

(3) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation

on the Ninth Claim For Relief in the amount of Fifty Thousand ($50,000.00) Dollars;

All together with costs and disbursements of the action.

WHEREFORE, plaintiff Mordechai Muscatel demands judgment:

(1) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Tenth Claim For Relief in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars;

(2) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Eleventh Claim For Relief in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars;

(3) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Twelfth Claim For Relief in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars;

All together with costs and disbursements of the action.

WHEREFORE, plaintiff Zila Muscatel demands judgment:

(1) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation

on the Thirteenth Claim For Relief in the amount of Fifty Thousand ($50,000.00) Dollars;

(2) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Fourteenth Claim For Relief in the amount of Fifty Thousand ($50,000.00) Dollars;

(3) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Fifteenth Claim For Relief in the amount of Fifty Thousand ($50,000.00) Dollars;

All together with costs and disbursements of the action.

WHEREFORE, plaintiff Hagai Koren demands judgment:

(1) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Sixteenth Claim For Relief in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars;

(2) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation

on the Seventeenth Claim For Relief in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars;

(3) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Eighteenth Claim For Relief in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars;

All together with costs and disbursements of the action.

WHEREFORE, plaintiff Dalia Koren demands judgment:

(1) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Nineteenth Claim for Relief in the amount of Fifty Thousand ($50,000.00) Dollars;

(2) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation on the Twentieth Claim for Relief in the amount of Fifty Thousand ($50,000.00) Dollars;

(3) jointly and severally against defendants Standard Precision a Division of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation

on the Twenty-first Claim for Relief in the amount of Fifty Thousand ($50,000.00) Dollars;

All together with costs and disbursements of the action.

CONDON & FORSYTH

By /s/ WILLIAM L. SCHIERBERL
William L. Schierberl
A Member of the Firm
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870
Attorneys for Plaintiffs Israel Aircraft Industries, Ltd., Zohar Landau, Nira Landau, Mordechai Muscatel, Zila Muscatel, Hagai Koren and Dalia Koren

Answer of Standard Precision to Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Standard Precision, a division of Electronic Communications, Inc. and Electronic Communications, Inc. for their answer to the amended complaint herein allege as follows:

1) Denies knowledge sufficient to form a belief as to the allegations contained in paragraphs 1 through 4, 13, 14, 17, 19, 20, 21, 23 through 31, 93, 97, 101, 136, 140, 144, 179, 183 and 187 of the complaint.

2) Admits for the purposes of this action only, the allegations contained in paragraphs 5 through 9, 11, 12, 15 and 18 of the complaint.

3) Denies the allegations contained in paragraphs 10, 32 through 38, 40 through 49, 51 through 60, 62 through 69, 71 through 80, 82 through 91, 94, 95, 98, 99, 102, 103, 105 through 112, 114 through 123, 125 through 134, 137, 138, 141, 142, 145, 146, 148 through 155, 157 through 166, 168 through 177, 180, 181, 184, 185, 188 and 189.

4) Admits that the allegation contained in paragraph 16 is a question of law which is respectfully submitted to the court for determination, but except as specifically admitted herein, denies said allegations.

5) Denies the allegations contained in paragraph 22 of the complaint, but admits that Standard Precision Division of Electronic Communications, Inc. manufactured certain

Wing Flap Actuator Systems, including inboard and outboard screw Jack Assemblies bearing North American Rockwell specification numbers 6193044-501 and 6193044-1 respectively, and Standard Precision Division of Electronic Communications, Inc. Part Numbers 1103572 and 1103573 respectively, and both bearing Serial Number 127.

6) With respect to the allegations contained in paragraphs 39, 50, 61, 70, 81, 92, 96, 100, 104, 113, 124, 135, 139, 143, 147, 156, 167, 178, 182 and 186 of the complaint, repeats and realleges the answers heretofore made herein to the specific paragraphs of the complaint set out in each of said paragraphs 39, 50, 61, 70, 81, 92, 96, 100, 104, 113, 124, 135, 139, 143, 147, 156, 167, 178, 182 and 186 respectively with the same force and effect as if said answers herein and hereat set forth separately in full.

As and For a First, Separate, Complete and Affirmative Defense

7) Plaintiff's claims are barred by the applicable Statutes of Limitations.

As and For a Second, Separate, Complete and Affirmative Defense

8) The accident alleged in the complaint resulted from the negligence and contributory negligence of parties other than these defendants, including the plaintiffs, and was in no way contributed to by these defendants.

As and For a Third, Separate, Complete and Affirmative Defense

9) The complaint, and the causes of action and claims set forth therein fail to state a cause of action or claim against these defendants for which relief can be granted.

Answer of Standard Precision to Amended Complaint

As and For a Fourth, Separate, Complete and Affirmative Defense

10) The product manufactured by Standard Precision Division of Electronic Communications, Inc. was safe for use if used in the manner instructed, and/or, standard in the industry, and the failure of the plaintiffs to adhere to such instructions and/or standards was an unintended use and misuse under the conditions and circumstances, and was proximate, superceding and intervening cause of the injuries and damage alleged by the plaintiffs.

As and For a Fifth, Separate, Complete and Affirmative Defense

11) The plaintiffs knew or should have known that it was dangerous to be involved in operating an experimentally configured aircraft such as that identified in the complaint, and failed to take reasonable precautions in the circumstances, and thereby voluntarily assumed the risk of the happening of the accident, and voluntarily exposed themselves and their property to an unreasonable exposure, which conduct was the proximate, superceding and intervening cause of the injuries and damage alleged by the plaintiffs.

As and For a Sixth, Separate, Complete and Affirmative Defense

12) The alleged accident occurred as a result of conduct on the part of the plaintiffs, their agents, servants or employees, which unreasonably exposed the aircraft and crew to dangers which were known, or should have been known, which conduct was the proximate, superceding and inter-

vening cause of the injuries and damages alleged by the plaintiffs.

As and For a First, Separate Counterclaim Against Israel Aircraft Industries, Inc.

13) These defendants specifically deny any defect or unsafe condition in the products or manufactured or sold by them, and specifically deny that such products at the time of their manufacture and sales were not fit for the purposes intended; however, if any such product was defective, unsafe or unfit for its intended use on the date of the accident, such condition was caused by the wrongful acts of Israel Aircraft Industries, Inc., and these defendants are therefore entitled to be indemnified by, and have contribution from said, Israel Aircraft Industries, Inc.

Dated: New York, N.Y.
July 5, 1973

MENDES & MOUNT
Attorneys for Defendants

By /s/ JAMES M. FITZSIMONS
A member of the firm
Office and P. O. Address
27 William Street
New York, New York 10005
(212) 344-7100

Defendants' Notice for Production of Documents

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that, pursuant to Rule 34 of the Federal Rules of Civil Procedure, Defendants request that you produce for inspection and copying by Defendants originals of the following items, or if originals are unavailable, copies thereof, at the offices of Mendes & Mount, 27 William Street, New York, New York on the 10th day of July, 1973.

1. The report of the Ministry of Transport, and all appendices thereto, including English translations thereof, pertaining to the investigation into the accident alleged in the complaint.

2. The minutes of the testimony before the Ministry of Transport, including English translations thereof, pertaining to the accident alleged in the complaint.

3. All reports, memoranda, letters, correspondence, records, recordings, photographs, statements, and other documents, writings or tangible things, either generated by any of the plaintiffs, or which have come into their possession or control, relating to any investigations into the accident alleged in the complaint.

Defendants' Notice for Production of Documents

4. All reports, memoranda, letters, correspondence, specifications, plans, drawings, photographs, records, recordings, and any other documents, writings or tangible things in the possession or control of any of the plaintiffs relating to the purchase, manufacture, remanufacture, compounding, recompounding, assembly, reassembly, design, redesign, processing, reprocessing, testing, retesting, construction, reconstruction, fabrication, refabrication, modification, remodification, analysis, reanalysis, inspection, reinspection, maintenance and operation of the aircraft identified in the complaint, or any component part thereof.

5. Contractual agreement of September 11, 1967 between Rockwell-Standard Corporation and the State of Israel and all addenda, schedules, memoranda, annexes; and, minutes and inter-office correspondence relating to the negotiation and execution of the agreement.

6. Further and separate agreement of September 11, 1967, between Rockwell-Standard Corporation and Israel Aircraft Industries, Ltd., along with supporting exhibits and any minutes, memoranda and correspondence relating to the negotiations, interpretation and execution of the agreement.

7. Basic agreement between Aero Commander Division-North American Rockwell Corporation and Israel Aircraft Industries, Ltd., of March 27, 1968 for providing twelve (12) ship sets of parts and supporting purchase order or orders, along with annexed schedules, addenda, and related memoranda and correspondence.

8. Bill of Sales of North American Rockwell Corporation Model No. 1121 Aero Commander aircraft Serial No.

29 dated February 13, 1969 and accompanying affidavits and receipts.

9. Special agreement, if any between North American Rockwell and Israel Aircraft Industries, Ltd., pursuant to which Aero Commander aircraft Serial No. 29 was sold.

10. Special agreement, if any between North American Rockwell and Israel Aircraft Industries, Ltd., pursuant to which Aero Commander aircraft Serial No. 107 was sold.

11. All personnel records of the individual plaintiffs which are in the possession or control of Israel Aircraft Industries, Ltd., including but not limited to payroll, medical, hiring, training, and work of the individual plaintiffs as employees of said Israel Aircraft Industries, Ltd.

Dated: New York, New York
July 5, 1973

MENDES & MOUNT
Attorneys for Defendants

By /s/ JAMES M. FITZSIMONS
James M. FitzSimons
A Member of the Firm
27 William Street
New York, NY 10005
(212) DIgby 4-7100

Defendants' Notice of Taking Depositions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that the depositions of each of the plaintiffs will be taken pursuant to Rule 30 of the Federal Rules of Civil Procedure, before a Notary Public, at the offices of Mendes & Mount, 27 William Street, Borough of Manhattan, City and State of New York, on the 17th day of July, 1973 at 10:00 a.m., with respect to all matters which are relevant and material to the issues and subject matter of this action. The deposition of Israel Aircraft Industries, Ltd., will be taken through the following agents and employees:

1. Mr. Avraham Hacohen
   Chief Test Pilot 1A1
2. Mr. Hagai Koren
   Co-pilot in the a/m flight
3. Mr. Zohar Landau
   Test Engineer in the a/m flight
4. Mr. Mordechai Muscatel
   Test Technician in the a/m flight
5. Mr. Y. Yacobi
   Project Manager 1A1

6. Mr. M. Blumkin
   Head Mechanical Design Dpt. 1A1
7. Mr. M. Sivan
   Head Aerodynamics Dpt. 1A1
8. Mr. Y. Gur-Lavi
   Head Flight Test Dpt. 1A1
9. Mr. A. Offer
   Head Aeroelasticity Dpt. 1A1
10. Mr. Gilboa
    Senior Inspector Tamon Directorate, Manufacturing Division 1A1
11. Mr. Nachum Yahalom
    Test Pilot 1A1
12. Mr. Czinczenheim
    Aerodynamics Consultant 1A1
13. Mr. Ackerman
    Mechanical Design Dpt. 1A1
14. Dr. Sinai
    Metallurgical Supr. 1A1

PLEASE TAKE FURTHER NOTICE, that you are required to produce the persons named herein together with all documents, drawings, plans, instructions, manuals, photographs, correspondence, memoranda, and all other records relating to the transactions which are the subject matter of the allegations of the plaintiffs Amended Complaint, including but not limited to the items described in de-

fendants' Notice for the Production of Documents, dated July 5, 1973, which accompanies this Notice.

Dated: New York, New York
July 5, 1973

Yours, etc.,

MENDES & MOUNT
Attorneys for Defendants

By /s/ JAMES M. FITZSIMONS
James M. FitzSimons
A Member of the Firm
27 William Street
New York, New York 10005
(212) DIgby 4-7100

Reply of Plaintiff Israel Aircraft Industries, Ltd. to Counterclaim

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff Israel Aircraft Industries, Ltd. by its attorneys, Condon & Forsyth, for its Reply to the Counter-Claim contained in the Answer of defendants Standard Precision a Division of Electronic Communications, Inc., and Electronic Communications, Inc., alleges:

As to the Counter-Claim Against Israel Aircraft Industries, Ltd.

Denies the allegation contained in paragraph 13 of defendants' Answer to Amended Complaint.

WHEREFORE, plaintiff Israel Aircraft Industries, Ltd. demands judgment dismissing the Counter-Claim.

Dated: New York, New York
July 24, 1973

CONDON & FORSYTH

By /s/ WILLIAM L. SCHIERBERL
William L. Schierberl
A Member of the Firm
1251 Avenue of the Americas
New York, New York 10020
Tel.: (212) 757-6870
Attorneys for Plaintiff
Israel Aircraft Industries, Ltd.

Defendants' Interrogatories

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

---

[1] SIRS:

PLEASE TAKE NOTICE that each plaintiff is required to answer the following applicable interrogatories, under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure. These are continuing interrogatories, and supplemental answers thereto up to the time of trial are required.

1. State your full name, and also the name you customarily use.

2. Please state your residence address and telephone number,

(a) at the present time, and

(b) at the time of the accident.

3. Please state the name, address and telephone number of your place of employment and type of work,

(a) at the present time, and

(b) at the time of the accident.

4. Have you ever been known by any other names, including any alias or assumed name?

(a) If your answer is "yes", please state such names, your residence addresses when used, and the approximate inclusive dates when used.

[2] (b) Give the reason for each change of name.

5. What is your age, birthdate, place of birth (City, County and State, or what Country), and the exact name appearing on your birth certificate?

6. Please list in chronological order the residence address where you have resided in the past ten years indicating the approximate dates you resided at each address, commencing with the present.

7. In connection with your marital status, please state:

(a) If single, married, widowed, or divorced,

(1) at the time of the accident, and

(2) at the present time.

(b) If married, give the full name and age of your spouse and date and place of marriage, and last known address of spouse if separated,

(1) at the time of the accident, and

(2) at the present time.

(c) If you have children, give the names and ages of your children and who has custody of them.

(d) If you have ever been married to someone else other than in your answer to (b) above, please list to whom, when, and where, for what approximate period of time by

dates, and whether the marriages were terminated by death, divorce or annulment.

(e) If you have ever been divorced, please state on each occasion when and in what city and state you were divorced and the last known address of each former spouse.

(f) If a divorce action or actions were ever filed but not concluded, state when and where they were filed and the names of the parties to each divorce action.

[3] 8. If you are married, state the employment or business occupation of your present spouse, the name of the place employed and the name used by your spouse at such employment or business,

(a) at the time of the accident, and

(b) at the present time.

9. If you have ever been convicted of a felony, describe the offense or offenses and when and where committed, and under what name or names you were convicted, and when and in what city, state and country.

10. If you were unconscious at any time as a result of injuries sustained in the accident, please indicate when, where, and for how long, and whether continuous or intermittent.

11. If you received any injuries of any kind whatsoever (whether objective or subjective) as a result of this accident of which you, your attorney, or your doctors are aware of suspect;

(a) Please list and describe each in specific detail giving the exact location within or upon your body of all of

your injuries and the nature of your complaints (whether physical, dental, emotional, nervous, mental or psychological).

(b) If you have completely recovered from each such injury and complaint, state the date you recovered from each such injury or complaint.

(c) If you have not fully recovered from any injury or complaint, identify each of which you complain.

(d) If you still have complaints, list separately all of your present disabilities and complaints (whether objective or subjective), the frequency and duration of your complaints of pain, etc., the location of and degree of any limitations of motion you now have, and a detailed description of any scars you have at the present time which you attribute to the accident.

[4] (e) Separately list and describe each of your claimed permanent disabilities.

(f) If you claim any permanent scars, disfigurement or other cosmetic defects, present or potential, as a result of the accident, describe in detail the area of the body affected, the approximate dimension of the area, and the name and address of any person who has taken any photographs showing the injury and when taken.

(g) If as a result of any injury in the accident sued upon, any doctor gave you a temporary or permanent disability rating, please give the name and address of the doctor, what the rating covers, when the rating was made, the percentage of rating, and the reason therefore.

12. Describe all of the injuries and complaints (whether physical, dental, emotional, nervous, mental or psycholog-

ical) that you claim you sustained or suffered as a result of the accident and the effects upon you which you could observe or feel or sense.

(a) At the scene of the accident;

(b) Upon your arrival at the hospital;

(c) Upon discharge from the hospital;

(d) One month after the accident; and

(e) At the present time.

13. If, as a result of any injuries sustained in the accident, you were unable to perform any of your normal and usual functions, duties, or activities or whatever nature at any time since the accident (which you were able to perform before the accident), please state each such function, duty, and activity you were unable to perform and why, the inclusive period of time from date to date that you were unable to perform each such; and also separately state what functions, duties, or activities, if any, you were still unable to perform and why:

[5] (a) In connection with your work, employment, or business, and

(b) In activities other than your employment or business, describing in detail the type of such activity (social, recreational, golf, housework, hobby, etc.) and the extent of the curtailment, limitation or restriction.

14. Do you or does anyone on your behalf contend that as a result of injuries sustained in the accident there has been any aggravation of a pre-existing condition (whether a prior illness, disease, injury, or a mental, nervous or psychological condition)?

(a) If you do so contend, state the condition which has been aggravated, which of your injuries caused the aggravation, when the aggravation commenced, how long it lasted, and the extent or degree of aggravation.

(b) If you do so contend, when were you first advised or became aware that such a pre-existing condition existed and when it became aggravated and by whom, if anyone, were you advised that such a condition pre-existed and had been aggravated? If it is exclusively your own opinion, please so state.

15. Please state between which dates you were confined, if at all, as a result of the injuries you claim you received as a result of the accident:

(a) In a hospital and the address;

(b) Totally confined to your bed at home and the address; and

(c) Partially confined to your bed at home and the address; and

(d) Convalescing at home but not confined to your bed, stating the address where convalescing.

16. As a result of any injuries received in this accident, please state in chronological order the names and address of:

[6] (a) Each and every hospital, institution, rest home or sanitarium giving the dates of admission and dates of discharge from each such place where you were an in-patient; and

(b) Any hospital, clinic, institution or santiarium where you have been an out-patient giving the dates when

care, treatment, tests, x-rays, or special studies were performed thereat.

17. If you received any medical care or treatment from any doctor, psychiatrist, therapist or p ctitioner as a result of injuries received in said accident, please supply answers to the following:

(a) The date you first received such medical care or treatment, and the name and address of the doctor, therapist or other practitioner who first treated you and where (office, home, or hospital).

(b) The name and address of each such doctor whom you have seen for medical care or treatment as a result of injuries received in this accident.

(c) For what injury or complaint did each doctor, therapist, or other practitioner treat or care for you?

(d) The dates of care or treatment by each such doctor, therapist, or other practitioner identifying each separately.

(e) The treatment given and the treatment prescribed by each doctor, therapist, or other practitioner.

(f) The various kinds of medication and narcotics prescribed, by whom and for what purpose, where obtained, and the frequency and the period of time from date to date over which taken.

(g) The nature, extent, and duration by dates of any self-administered home care of therapy; and, if recommended by any doctor or therapist, give his name and address.

Defendants' Interrogatories

18. As distinguished from a treating or attending doctor [7] referred to in the previous Interrogatory, what is the name and address of each such doctor who has merely examined you or been consulted by another doctor, his specialty, the date or dates of such examination, and for what specific injury, complaint or condition has he examined you?

19. If as a result of the accident you were confined to a hospital:

(a) State the names and address of each doctor, therapist or other practitioner who examined or treated you at each of the hospitals at which you were confined and at which hospital.

(b) Describe any surgery performed upon you as a result of any injuries received in the accident, when and where performed, and by what doctor or doctors.

20. What future surgeries are contemplated, whether imminent or remote, for what reason and what condition, and state if you know, approximately when such will be performed, by whom, and where.

21. As of this time, are you still being treated, examined or attended by any doctor, therapist, or other practitioner?

(a) If so, for what specific injuries, conditions, or complaints are each examining or treating you and what type of examination, treatment or medication are each giving you?

22. If you are not at this time still being treated or periodically examined by any doctor, therapist, or other practitioner, when were you last treated and when last examined and by whom?

Defendants' Interrogatories

23. Set forth the date of your next scheduled medical appointment or therapy treatment giving the name and address of the person or organization with whom you have the appointment.

24. Please give the names and addresses of each doctor, technician, hospital, clinic or laboratory that has conducted or performed any kind of special studies, tests, or x-rays, the dates thereof, the name or names of each such test, or special study, [8] the parts of your body x-rayed, and the name of the person or doctor (whether treating or merely examining) who ordered the same.

25. Have any of the doctors who have attended, operated, treated, consulted, or merely examined you made written reports to you, your attorney, your employers, any insurance carrier, any governmental agency, or to anyone acting in your behalf relating to the injuries or complication from injuries which you claim to have sustained as a result of the accident?

(a) If so, state the date of each such report, the addresses of each such report, the name of each doctor making any such report, and the name and address of the present custodian of each such report.

26. If any doctor had advised you or your attorney or anyone acting in or on your behalf,

(a) As to the diagnosis of any of your injuries, please state the diagnosis made of each injury, and the name and address of the doctor making the diagnosis and the date thereof;

(b) As to the prognosis of your injuries, please state what it is as to each injury and whether temporary or

permanent, and the name and address of the doctor making the prognosis and the date thereof.

27. If, from the date of the accident to the present time, you have taken any trips out of the country, when you have been away from your home for more than 48 hours, please state when, how long, where you went, for what purpose, the type of transportation used, and the name and address of those who accompanied you.

28. If you have been involved in any other accident or accidents, before of after the one here sued upon in which you sustained personal injury, please state as to the first such occurrence and as to each subsequent occurrence:

(a) The dates and places of each such occurrence;

(b) The names and addresses of the person or persons [9] involved in each such occurrence separately stated as to each occurrence;

(c) A brief description of each such occurrence;

(d) The approximate dates between which you were away from your employment or business, if any, as a result of such occurrence, or the extent to which your other usual and normal functions and activities were impaired, limited, or interfered with;

(e) All of the injuries (including dental) you sustained, and any permanent or partial residual disability you sustained, separately stated as to each such occurrence;

(f) What injuries you recovered from and the dates of recovery, and what injuries you did not recover from;

(g) If any doctor or insurance company or Industrial Accident Commission gave you a temporary or permanent

disability rating, please give the name and address of the person, company, or tribunal, when the rating was made, what for, the percentage of rating, and the reason therefor;

(h) If you have ever received a permanent scar or disfigurement, describe the same in detail.

29. If you have been involved in any other such accident or accidents in which you were injured before or after the one you are suing upon, please state separately as to each such accident:

(a) The names and addresses of all doctors who treated or examined you and their specialties, if any, and approximately when and where (hospital, doctor's office, or home) you were treated, examined, or operated upon.

(b) The names and addresses of all hospitals, clinics rest homes, sanitariums or institutions at which you were confined or treated, what condition occasioned your confinement there, and [10] the approximate dates between when you were so confined.

(c) What areas of your body were x-rayed, the types of any special laboratory tests or studies made, and the approximate date, and the name and address of the place where taken or made.

(d) If any operations were performed upon your person, describe the nature of it, by whom performed, approximately when, the name and address of the hospital, and the results of such surgery.

(e) Describe generally the care or treatment you received from each doctor, therapist, or other practitioner, and approximately when and where administered.

(f) If in connection with your treatment any drugs were prescribed, state to the best of your recollection, by whom prescribed, where such drugs were obtained and upon what occasions.

(g) Was a written statement given by you or taken from you by any person or organization with reference to any such accident or as to your physical condition and, if so, state the name and address of the person, firm, or corporation to whom such statement was given, approximate date given, and the name and address of the person or organization that has custody thereof.

30. If you have been involved in any other accident or accidents before or after the one you are suing upon and have ever filed legal proceedings for personal injuries, please state:

(a) The date, place, court or Industrial Accident Commission or similar tribunal were filed.

(b) Names and addresses of each of the parties to the lawsuit or Industrial Accident Commission proceeding and their [11] attorneys, if any.

(c) The nature of the injuries claimed.

(d) The present status of each lawsuit or proceedings or if concluded, the final result of each lawsuit or proceeding, and any monetary, judgment, settlement, or Industrial Accident Commission award.

31. As differentiated from physical injury received in an accident, have you suffered in the last ten years prior to the date of answering these interrogatories from any condition of illness, malady, sickness, systemic condition or disease,

disability or handicap, or from any condition of physical, nervous, mental, or emotional disorders, problems, or symptoms, whether before or after the accident sued upon? (Minor illnesses of short duration may be omitted.) If so, the first such condition and separately as to each subsequent condition, please state:

(a) The identity, nature, and extent of such condition, and the inclusive period of time from date to date that you suffered from such; whether you fully recovered or not; whether the conditions are chronic or recur intermittently; and what permanent or partial residual disability, if any, you sustained.

(b) The approximate dates between which you were away from your employment or business, if any, as a result of such condition, or the extent to which your usual and normal activities were impaired, limited, or interfered with.

(c) As to each such condition or occurrence, please supply hereunder the information requested in Interrogatory Number 29.

32. If you claim any dental injury as a result of the accident sued upon, please describe the condition of your teeth prior to the accident and the name and address of the dentist you last saw for care or treatment prior to the accident.

[12] 33. If you ever had any accident, health, disability, hospitalization, or life insurance rejected, cancelled or the renewal refused by any insurance company give the names and addresses of such insurance companies, the approximate date or dates of such rejection, refusal or cancellation, and the reason or reasons given for the action.

(a) Please state the name and addresses of any insurance company that ever gave you a medical examination during the last ten years as a prerequisite to issuing a policy or continuing benefits under an existing policy, the dates of such examinations, and the name and address of the doctor who performed the examination.

34. If you were ever in the military service, coast guard, or merchant marine of the United States or any other country, please state:

(a) Which country, branch of service, serial number and the inclusive dates of your service.

(b) Your rate or rank on discharge, the name and the inclusive dates of your service.

(c) If you were injured or seriously ill while in such service, please give the details of each injury or illness; and if you were hospitalized while in service, please give the approximate dates of hospitalization, the names and locations of the hospitals, the reasons for hospitalization, and the treatment rendered.

(d) If you are now, or in the past have been, receiving disability compensation for an in-service connected disability, the percentage of disability allowance awarded, the amount of the award or allowance, the dates over which it has been paid, and your claim number with the U. S. Government or Veterans Administration or other Government.

[13] (e) If you had ever been exempted or rejected for military service, state the reason or reasons therefor.

35. With reference to your past and present employment or occupation, please state:

(a) Your social security number or equivalent.

(b) The names and addresses of all places where you have been employed or engaged in business during the last ten years, listing the same in chronological order commencing with your present employment or business occupation and indicating after each employment the approximate inclusive period from date to date worked there, and the reason for termination.

(c) At each such place of employment, state your job classification or position with a brief description of your duties and responsibilities at each such place, whether the employment was continuous or seasonal, the number of hours worked per week.

(d) The name under which you were employed at each place or the business or firm name which you used while you were engaged in business at each such place.

(e) The approximate wages, salary, or other renumeration you received at each such place of employment or business, but in the case of your last employment by others before the accident, state specifically your income both before deductions (gross pay) and after deductions (take-home pay). Indicate for each employment whether you were paid on an hourly, weekly, monthly, or annual basis, or on a piece work and incentive basis.

(f) The name of your immediate supervisor, boss, or foreman at each such place of employment.

36. In connection with your foregoing past and present employment, please state:

(a) If you had any physical or medical examination at any time in connection with each of the foregoing employ-

ments, [14] and, if so, give the approximate dates and places of each such examination and the name of the doctor, if you recall.

(b) If, as a result of any employment or pre-employment medical examination, either before or after the accident here sued upon, your employment was ever terminated at any time or employment refused, please describe approximately when it occurred, for what reason or reasons, the name and address of the employer or prospective employer, and approximately when the medical examination was made, where, and by whom.

37. What is your education, special training and experience for your work, business, occupation or profession?

38. If you have lost any time from your work since the accident referred to in your lawsuit and solely because of injuries sustained in the accident, please state:

(a) The exact date you were able to return to work (1) part time and (2) full time.

(b) The exact date you actually returned to work (1) part time and (2) full time.

(c) The exact periods of full time you lost, indicating the dates you did not work at all for a full day, and also indicating separately and partial time lost by stating the hours lost and the dates on which such occurred.

39. If you have not returned to your former employment since the accident and are not now employed elsewhere, have you made any application for employment elsewhere? If so, please state the names and addresses of the firms or governmental agencies where you applied for

employment, the approximate date of the application, the type of work sought, and the result of the application.

40. If due to your claimed injuries resulting from the accident:

[15] (a) You were unable to work full time, state your rate of pay or compensation and how much total salary, compensation, or income you actually lost explaining in complete detail how you compute such total amount of claimed loss.

(b) You were able to work only part time or intermittently or without overtime or upon a restrictive or limited basis, please describe in detail the extent of such time lost from work, the duties you could not perform, those you could perform, for how long this condition lasted (giving the inclusive dates for each), each amount, if any, that your regular salary, rate of pay or income was diminished, and a total amount of such claimed loss, explaining in complete detail how you compute the same.

41. If you are still not working full time but are able to work only part time or intermittently, please state how much longer or for what period of time you anticipate you will be unable to work full time specifying the approximate dates, and also give your best estimate of your future claimed loss of earnings or income and explain how you compute the same. Also give the specific reasons why you are now unable to work full time, such as a specific injury or your old position is not presently available on a full time basis.

42. If you have lost any time from work since the accident for any other reason not due to injuries received in

the accident, please state the reasons and indicate the periods of time lost and the amount of income lost, if any, stating in complete detail how you compute such a loss.

43. If your injuries are such that you have had to or will have to change your work or occupation, please explain why and when and what different type of work or business you will have to engage in, and the claimed loss of earnings, if any, occasioned thereby and explain in detail how you compute the same.

[16] 44. If you had to hire anyone to assist you in the performance of your regular duties at work or in your home or elsewhere that you would have otherwise performed during your period of disability that resulted from the injuries referred to in your lawsuit, please:

(a) State the names, addresses, and duties of anyone so hired;

(b) Describe the nature of the work performed by the person or persons so hired, the hours worked, the inclusive period of time from date to date of such employment, the rate of pay, and the total amount actually paid, and the amount still owing.

45. If you were self-employed at the time of the accident and you claim to have lost any income solely as a result of this accident, fully describe your business, firm, or partnership; and state how much net income you claim to have lost; and explain in complete detail how you compute such a loss.

46. If you were self-employed at the time of this accident, how much gross and how much net income did you realize

from your business for each of the three full calendar years or fiscal years immediately preceding this accident and also for the period of time thereafter to the present time. (If you were engaged in a partnership or joint venture, specify such amounts for the firm, and separately supply the percentage and amount of your actual participation in the net income for such periods of time, and what your normal percent of participation is.)

47. Do you have in your possession or under your control any books, papers, documents, ledgers, or records which will support your claimed loss of business income, or salary, or wage?

(a) If so, please describe and identify them.

(b) Will you voluntarily permit us to inspect these books and records?

[17] (c) Who has custody of them and where are they located?

48. Did you file Income Tax returns for each of the three years immediately preceding this accident and for any income tax period since the accident?

(a) Do you have copies of such tax returns?

(b) If so, will you voluntarily permit us to inspect your copies of such returns?

(c) Will you keep your copies of such returns and keep your control books and records intact and available for your deposition and use at the time of trial?

(d) Where are the copies of your income tax returns and your control books and records kept and the name and address of the person or firm who now has custody of them?

(e) What are the names and addresses of your bookkeepers, accountants, or other persons, or organizations who prepared your income tax returns and kept your control books and records pertaining to your income or business for each of the three fiscal or calendar years prior to the accident and for all subsequent periods of time to the present date?

49. If you were a student, full time or part time, and you claim the accident or your injuries prevented or interrupted your regular or special schooling or other academic courses, please state:

(a) What school or college you were attending at the time of the accident and the name and address.

(b) Your academic grade, special courses, or schooling being undertaken at the time of the accident.

(c) The extent to which such schooling or education was interrupted, postponed, or retarded, and whether any absences were made up by tutoring or otherwise, how long you were out of school or expect to be (giving dates), and the effect, if any, upon your grades.

[18] (d) If you have now returned to school or college, are you on a restricted activity basis? If so state to what extent.

50. In connection with your claim for medical, dental, and other expenses for which you have already received bills, please state:

(a) The amount of each bill, the date thereof, the items charged, the dates on which services were rendered, the name and address of the person or firm that rendered or

supplied the same. (Itemized bills may be attached to supply portions of your answers if in sufficient detail.)

(1) For each doctor, therapist, and other practitioner, including any dental expense.

(2) For each hospital, clinic, sanitarium, rest home or institution.

(3) For the purchase or rental charge for each orthopedic device, appliance, prosthesis, crutch and hospital supply and equipment and if rented, the period of time actually identifying and describing what each item was for.

(4) For drugs, medicines and medical supplies, and when and where purchases.

(5) For nursing care, giving the inclusive period of time from date to date and the shifts, and indicating whether the care was by a registered or practical nurse and the name and address of each nurse.

[19] (6) For household help and household services, the nature of the work, the frequency supplied, the inclusive period of time from date to date that such work or services were furnished, and the name and address of each such employed person or firm rendering such services, and their relationship to you, if any.

(7) For any other medical expenses including first aid.

(8) For ambulance service.

(b) Have all of the above medical bills and the other expenses above referred to been paid? If not, list the ones which have been paid in full or the amounts of each paid in part. If any such medical, dental, and related expenses have been paid, by whom were they paid.

51. If there are obligations for any other medical or dental or any other expenses for which you have not as yet received bills, please describe which ones, what for, the name and address of the creditor and relationship to you, if any, and your best information or estimate as to the probable amount.

52. In connection with your future medical and dental expense and care based upon your best information and belief or based upon what you can ascertain, please describe in detail the duration of such future medical and dental care, the nature of it, what it will be for, by whom it is to be rendered, if now known, and the estimated cost thereof by each such person or institution.

53. Are there any other anticipated medical expenses of any nature to be incurred that are not listed above, such as medicines, medical supplies, nursing, household care and services, special clothing or appliances, etc., of which you are aware or [20] health benefits, or workmen's compensation benefits), please state:

(a) The name and address of each such insurance company and the name and address of the insurance agent writing the policy.

(b) The name and address of each insured, the policy numbers, and a description of which of the foregoing enumerated coverages were provided and the amounts thereof.

(c) The name and address of any public agency which provided any such coverages, or furnished public aid.

(d) What benefits, if any, did you apply for (whether paid or not.)

(e) If someone other than you applied for the benefits on your behalf, give the name and address of such person and the specific benefits applied for.

(f) Separately list any such benefits as have been paid or furnished, when such was paid or furnished, the rate, the total amount, and by whom.

[Interrogatories 54 through 58 not included in interrogatories served.]

59. If you, or anyone on your behalf, has ever made any written reports, applications, claims or statements with reference to how the accident happened or as to your injuries, or with reference to your claim for reimbursement of expenses incurred or other benefits, please state:

(a) The person, firm, corporation, insurance agency, insurance company, employer, governmental or public agency, or law enforcement agency to whom such report, statement, claim, or application was made, and their addresses.

(b) The date of each such report, statement, claim, or application; and, without disclosing the content thereof, state generally the type of report and the general nature of it.

(c) The name and address of the present custodian of such report, application, claim or statement, or of any copy thereof.

[21] 60. State the witness names, addresses and telephone numbers known to you, your attorney, your insurance carrier, their representatives, or anyone acting in your behalf or their behalf;

Defendants' Interrogatories

(a) Of all persons who saw or heard, or claim to have seen or heard, or of any other person who claims to have any knowledge of any of the events or happenings which occurred at the time of or at the scene of the accident referred to in your lawsuit, or of the events leading up to or immediately after the said accident, or the condition of any of the parties during the 24-hour period prior to the accident. State the relationship of each witness to you.

(b) Of all persons who heard, or claim to have heard, any statements made by any plaintiff herein, or any defendant herein, or by any agent, or employee or employer or permittee of any plaintiff or of any defendant herein, or of any other person, concerning how the accident happened or the person or persons at fault in said occurrence.

(c) Of all persons who have, or claim to have any knowledge concerning the injuries or damages sustained by you or others in the accident, other than in your case the doctors you have previously mentioned.

61. State as to each person named in your answers to the preceding interrogatory whether you, your attorney, employer, insurance carrier, their representatives, or anyone acting in your behalf or their behalf have obtained or received from anyone:

(a) Any written statement or statements signed or initialed by such person, including any plaintiff or defendant herein, or their permittee, agent, employee, or employer. If the answer is "yes", then also state the date and place each statement was obtained, the name, address of the person who gave the statement, and the person who prepared or obtained such statement, and the name and address of the person who now has custody of each statement.

[22] (b) Any other or additional record, such as a transcription, digest, report, notes, or memorandum in any type or form whatsoever (whether handwritten, typewritten, reporter's notes, recording device, or otherwise), or any oral statements or statement or digest or summary thereof made by such person, including any plaintiff or defendant herein, or their permittee, agent, or employee or employer. If the answer is "yes", then also state the date and place each such record was made, or obtained; describe the kind or form of each such record; state the name, address, and telephone number of the person who took or made each such record; and the name and address of the person who now has custody of each such record.

(c) Any statement, memorandum or recording device obtained from the client represented by the proponent of these interrogatories. If the answer is "yes", please state when, where, and by whom it was obtained, the name and address of the person who obtained it and of the person who now has custody of the same.

(1) Will you voluntarily supply a copy of the same, and if so, when?

62. If you, your attorney, employer, insurance carriers, their representatives, or anyone acting in your behalf or their behalf has taken or knows of anyone who has or claims to have taken, any still photographs or movies of the scene of the occurrence or of the general area or location of the occurrence mentioned in your lawsuit, of any other objects involved in said occurrence, or of your injuries or of anyone else injured in the accident please state:

(a) The name, address of the person or persons who took said photographs and moving pictures and the subject matter of each picture.

Defendants' Interrogatories

63. What was your age at the date the accident took place?

64. State and describe fully and in detail each and every act, omission, fault, or instance of negligence on the part of [23] these defendants, their agents, officers, or employees which the plaintiff claims caused or contributed to the accident involving the aircraft referred to in the Complaint, identifying by name or position the specific employees of defendants whom plaintiffs claim performed said act or failed to perform said act.

65. State whether plaintiffs claim that these defendants violated any statutes, regulations, rules or ordinances of the U.S. Federal Government, specifying the chapter or chapters, section or sections of the statutes, regulations, rules or ordinances.

66. State and describe fully and in detail the manner in which it is claimed that the defendants, their agents or employees negligently manufactured, compounded, planned, designated, processed, assembled, tested, constructed, fabricated, modified, analyzed, recommended, merchandized, advertised, promoted, distributed, inspected and sold the Wing Flap Systems, identifying by name or position the employees whom plaintiffs claim performed or failed to perform said acts.

67. State precisely the manner in which it is claimed that the Wing Flap Systems were defective in material, workmanship and design.

68. State precisely the manner in which it is claimed that the Wing Flap Systems were dangerous products and

unsafe for the use and purpose for which they were intended.

69. State precisely the manner in which it is claimed that the Aircraft flap system malfunctioned.

70. If it is claimed that any defendants or their employees expressly warranted said Wing Flap System, state whether the express warranty was oral or in writing; if oral, state the conditions and when, where, and by whom such warranty was made; if in writing, please attach a true copy.

71. If it is claimed that an express warranty was breached, state by whom and in what manner.

72. If it is claimed that Israel Aircraft Industries, Ltd. gave due notice to the defendants of the alleged breach of [24] the express warranties, state when, where, how and to whom said notice was given.

73. If it is claimed that the defendants impliedly warranted that the Wing Flap Systems were of merchantable quality and fit for the particular uses and purposes for which they were manufactured, state with particularity the particular uses and purposes for which the Wing Flap Systems were manufactured to include the types and model numbers of the aircraft for which the Wing Flap Systems were designed.

74. State in detail how it is claimed that the defendants breached the alleged implied warranties.

75. State precisely the manner in which the value of the aforementioned Aircraft 029 of $1,000,000 was computed.

Defendants' Interrogatories

76. Describe in detail any and all documents, memoranda and other written material known to you which can prove in any way any of the alleged acts of negligence and/or carelessness and/or wrongful acts or omissions referred to in the answer to Interrogatory Number 66.

77. As to all such materials referred to in your answer to Interrogatory Number 76, state the names, addresses, employers, and work positions of all persons who have said materials in their possession or under their control.

78. State whether actual or constructive notice is claimed on the part of these defendants of any of the negligence alleged in the Complaint and:

(a) If actual notice is claimed, state when, where by whom and to whom said notice was given.

(b) If constructive notice is claimed, state the facts plaintiff will claim constituted such constructive notice and state how long the alleged condition will be claimed to have existed prior to the alleged incident.

[25] 79. State the names, addresses, employers and work positions of all experts, technicians, analyzers, engineers and other persons known to you to have made studies or analysis as to the cause of the accident involved herein; and state the names, addresses, employers, and work positions of all persons having copies of any written reports of said persons in their possession or under their control.

80. Was the take off of the aircraft involved herein on January 21, 1970 normal in all respects?

Defendants' Interrogatories

81. Was the flight of the aircraft involved herein on January 21, 1970 normal in all respects up to the time of the accident?

82. If your answer to Interrogatory Number 81 is "no", please state in detail in what manner it was not normal and state the names, addresses, employers, and work positions or all persons having facts which tend to show said lack of normalcy.

83. As to each and every alleged non-normal flight maneuver, referred to in your answer to Interrogatory Number 82, please state how many seconds after lift off the maneuver began, the description of said maneuver, and for how many seconds said maneuver continued.

84. What defects in the aircraft involved herein could cause each of the non-normal maneuvers referred to in the answers to Interrogatories Numbers 81 and 82.

85. State the names, addresses, employers, and work positions of all persons who would have any information or facts pertaining to said possible defect mentioned in the answer to Interrogatory Number 84.

86. Are the plaintiffs or their counsel aware of any evidence which plaintiffs contend will show that the crash of that certain aircraft as described in plaintiff's Complaint was caused or contributed to by the physical failure of any component part of the aircraft.

[26] 87. If so, describe fully the nature, substance and source of such evidence, giving the names and addresses of any witnesses able to so testify and identify any document tending to establish such facts.

Defendants' Interrogatories

88. Are the plaintiffs or their counsel aware of any evidence tending to show that the crash of the aircraft as described in plaintiff's Complaint was caused or contributed to by the malfunction of any component part of the aircraft.

89. If so, describe fully the nature, substance and source of such evidence giving the names and addresses of any witnesses able to so testify and identify any documents tending to establish such facts.

90. Are the plaintiffs or their counsel aware of any evidence tending to show that the crash of the aircraft as described in plaintiff's Complaint was caused or contributed to by any defect in the design of the aircraft or any of its component parts?

91. If so, describe fully the nature, substance and source of such evidence giving the names and addresses of any witnesses able to so testify and identify any documents tending to establish such facts.

92. Are the plaintiffs or their counsel aware of any evidence tending to show that the design and construction of the aircraft as described in the plantiff's Complaint failed to comply with any applicable provisions in the Civil Air Regulation?

93. If so, describe fully the nature, substance, and source of such evidence giving the names and addresses of any witnesses able to so testify and identify any documents tending to establish such facts.

94. Are the plaintiffs or their counsel aware of any evidence tending to show that the actual design and construc-

tion of the aircraft described in plaintiff's Complaint or any of its [27] component parts failed to conform to the detailed specifications of a similar model aircraft?

95. If so, describe fully the nature, substance and source of such evidence giving the names and addresses of any witnesses able to so testify and identify any documents tending to establish such facts.

96. Are the plaintiffs or their counsel aware of any evidence showing that the aircraft as described in plaintiff's Complaint was dissimilar to any other aircraft sold or delivered on or before January 21, 1970 in any respect affecting its safe operations?

97. Are the plaintiffs or their counsel aware of any evidence tending to show that the aircraft as described in plaintiff's Complaint at the time of its sale contained any hidden defects or dangers unknown to the purchaser or user?

98. If so, describe fully the nature, substance and source of such evidence giving the names and addresses of any witnesses able to so testify and identify any documents tending to establish such facts.

99. If the answers to any of the Interrogatories Numbers 92 through 99 are in the affirmative, are plaintiffs or their counsel aware of any evidence tending to show that such non-compliance caused or contributed to the crash of the aircraft as described in plaintiff's Complaint?

100. If so, describe fully the nature, substance and source of such evidence giving the name and addresses of any

witnesses able to so testify and identify any documents tending to establish such facts.

Dated: New York, New York
June 12, 1974

MENDES & MOUNT

By /s/ DENNIS C. MURPHY
Dennis C. Murphy
A Member of the Firm
Attorneys for Defendants
Standard Precision, A Division
of Electronic Communications,
Inc.,

[28] ELECTRONIC COMMUNICATIONS, INC.
THE NATIONAL CASH REGISTER COMPANY,
and NORTH AMERICAN ROCKWELL CORP.
P. O. Box Address
27 William Street,
New York, New York 10005
344-7100

Defendants' Notice of Motion to Dismiss the Complaint Pursuant to Rule 37(d) for Failure to Comply With Notice of Taking Depositions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Dennis C. Murphy, duly sworn to this 26 day of September, 1974, upon the Notice of Taking Depositions served upon plaintiffs on or about July 5, 1973, and upon all the proceedings heretofore had herein, the defendants will move this Court at a Motion Part thereof in Rule 2903, at the Federal Court Building, Foley Square, New York, New York, on the 4th day of October, 1974, at 10 o'clock in the forenoon of that date or as soon thereafter as the counsel may be heard for an order pursuant to Rule 37(d) of the Federal Rules of Civil Procedure dismissing the Complaint heretofore served and filed in this action, for Plaintiff's failure to comply with Defendants' Notice of Taking Depositions, and for such other and further relief as the Court may deem fit and proper.

Dated: New York, New York
September 25, 1974

Yours, etc.

MENDES & MOUNT
Attorneys for the Defendants
27 William Street
New York, New York 10005

Affidavit of Dennis C. Murphy in Support of Foregoing Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

DENNIS C. MURPHY, being duly sworn, deposes and says that I am an attorney associated with the firm of Mendes & Mount, attorneys for the Defendants, and am fully familiar with the facts of this action.

This Affidavit is submitted in support of Defendants' motion to dismiss the Complaint pursuant to FRCP 37(d) for Plaintiff's failure to comply with Defendants' Notice Of Taking Depositions dated July 5, 1973.

The Plaintiff Israel Aircraft Industries is suing to recover the value of an aircraft purchased from North American Rockwell, which crashed in Israel. Three crew members are suing to recover for personal injuries sustained as a result of that crash. Their wives are suing for loss of services.

The Plaintiffs commenced this law suit in January, 1973.

Defendants' Notice Of Taking Depositions (see exhibit 1) contains the names of three Plaintiff crew members, who have been deposed, as well as ten employees of the Plaintiff, Israel Aircraft Industries, who were directly concerned with the modifications and flight testing of the aircraft. Of these ten individuals, only three have been de-

posed. One additional employee, not named in the Notice, was also deposed.

The Plaintiffs have not moved for a protective order pursuant to FRCP 26(c).

Those individuals named in Defendants' Notice Of Taking Depositions and not brought forward for depositions are:

Mr. M. Sivan
Head Aerodynamics Dept. 1A1

Mr. Y. Gur-Lavi
Head Flight Test Dept. 1A1

Mr. A. Offer
Head Aeroelasticity Dept. 1A1

Mr. Gilboa
Senior Inspector Tamon
Directorate, Mfg. Division 1A1

Mr. Nachum Yahalom
Test Pilot 1A1

Mr. Czinczenheim
Aerodynamics Consultant 1A1

Mr. Ackerman
Mechanical Design Dept. 1A1

The key issue in this case is the extent and effect of modifications made to the aircraft by Israel Aircraft Industries personnel after it was purchased from North American Rockwell.

The testimony of these individuals is vital to this issue in that all of them played important roles in the modifications and/or flight testing of the aircraft before the crash.

Affidavit of Dennis C. Murphy in Support of Foregoing Motion

The Israel Aircraft Industries employees deposed thus far have had only limited knowledge of the modifications and other important decisions concerning the redesign of the wing flap system and the flight test program.

It is further requested that Defendants be permitted to take the deposition of Myriam Rosen who made critical stress and loads calculations concerning the aircraft modifications.

The Defendants will be severely prejudiced and unable to prepare an adequate defense if these key individuals are not made available for depositions.

Wherefore, it is respectfully requested that the Court, in the exercise of its discretion, dismiss the Complaint, or in the alternative, order plaintiffs to make the above mentioned Israel Aircraft Industries employees available for depositions.

/s/ DENNIS C. MURPHY
Dennis C. Murphy

(Sworn to September 26, 1974.)

Exhibit 1 to Foregoing Affidavit

Notice of taking depositions printed above at pages 61a-63a.

Defendants' Notice of Motion to Dismiss Complaint Pursuant to Rule 37(d) for Failure to Produce Documents

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Dennis C. Murphy, duly sworn to this 1st day of October, 1974, upon Defendants' Interrogatories served upon Plaintiffs on June 13, 1974, and upon all the proceedings heretofore had herein, the Defendants will move this Court at a Motion Part thereof in Room 2903, at the Federal Court Building, Foley Square, New York, New York, on the 11th day of October, 1974, at 10 o'clock in the forenoon of that date or as soon thereafter as counsel may be heard, for an order pursuant to Rule 37(d) of the Federal Rules of Civil Procedure dismissing the Complaint heretofore served and filed in this action for Plaintiff's failure to serve answers to Interrogatories and failure to produce documents pursuant to Rule 34, and for such other and further relief as to the Court may deem fit and proper.

Dated: New York, New York
September 30, 1974

To:
Clerk, U.S. District Court
Foley Square
New York, New York

Yours, etc.

MENDES & MOUNT
Attorneys for the Defendant
27 William Street
New York, New York 10005

Affidavit of Dennis C. Murphy in Support of Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

DENNIS C. MURPHY, being duly sworn, deposes and says that I am an attorney associated with the firm of Mendes & Mount, attorneys for the Defendants, and am fully familiar with the facts of this action.

I submit this Affidavit in support of Defendants' motion to dismiss the Complaint pursuant to Rule 37(d) of the FRCP for failure to serve answers to interrogatories and failure to produce documents pursuant to Rule 34 of the FRCP.

Defendants' interrogatories (see exhibit 1) were served on the Plaintiffs on June 13, 1974, and filed with this Court. Plaintiffs have neither served answers nor objections to said interrogatories.

Defendants served a Notice for Production of Documents on or about July 5, 1973 (see exhibit 2). Defendants have renewed their request for documents during depositions of Plaintiffs.

Plaintiffs have not complied with Defendants' requests for the following documents:

Affidavit of Dennis C. Murphy in Support of Motion to Dismiss Complaint

1. The minutes of the testimony before the Ministry of Transport, including English translations thereof, pertaining to the accident alleged in the complaint.

2. All reports, memoranda, letters, correspondence, records, recordings, photographs, statements, and other documents, writings or tangible things, either generated by any of the plaintiffs, or which have come into their possession or control, relating to any investigations into the accident alleged in the complaint.

3. All personnel records of the individual plaintiffs which are in the possession or control of Israel Aircraft Industries, Ltd., including but not limited to payroll, medical, hiring, training, and work of the individual plaintiffs as employees of said Israel Aircraft Industries, Ltd.

4. The U.S. Federal Aviation Administration and the Israel C.A.A. type certificate data sheet issued for the Jet Commander model 1123.

5. Reports of physical examinations of Plaintiffs by Plaintiffs' physician.

6. Final report and photographs of Plaintiff's metallurgist, Dr. Cina.

7. All plans and specifications and other correspondence delivered to Comprehensive Designers International of London, England, relating to aircraft 29 modifications and the 1123 certification program.

Affidavit of Dennis C. Murphy in Support of Motion to Dismiss Complaint

8. All reports, correspondence, and engineering drawings received from Comprehensive Designers International of London, England, relating to aircraft 29 modifications the 1123 certification program.

9. All reports, inter-office memoranda specifications and engineering drawings indicating the specific modifications of aircraft 29.

10. All appendices to the Israel Ministry of Transport accident report relating to aircraft 29.

11. All accident reports submitted by Israel Aircraft Industries personnel.

12. All flight test plans relating to the three flights of aircraft 29.

13. All reports, letters, and inter-office memoranda by Messrs. Jacobi, Ackerman, Blumkin and Mrs. Rosen relating to the evaluation of the entire wing flap system of aircraft 29 before modifications by Israel Aircraft Industries.

14. All reports, memoranda, letters, correspondence, specifications, plans and drawings relating to the wing flap system modifications to aircraft 29 by Israel Aircraft Industries.

15. All reports, correspondence, memoranda, calculations and drawings relating to the decision to use and the installation of the Standard Precision model 1122 actuators on aircraft 29.

Affidavit of Dennis C. Murphy in Support of Motion to Dismiss Complaint

16. All reports, letters, inter-office memoranda and plans relating to the evaluation and the decision to remove the shear pins of aircraft 29.

17. All loads and stress analyses of the wing flap modifications to aircraft 29 by Israel Aircraft Industries.

18. All reports and documents which evaluated the maneuvers and testing of aircraft 29 after each of its three flights.

19. All photographs of aircraft 29 and its component parts taken after the crash.

20. All directives, instructions, letters, and regulations issued by Israel Aircraft Industries relating to the conduct, training, and uniforms of members and passengers of all aircraft engaged in flight testing in general and aircraft 29 specifically.

21. Transcript of all data obtained from the flight recorder of aircraft 29 during the three test flights.

22. All letters, memoranda and documents exchanged between Israel C.A.A. and IAI relating to the flight test program of aircraft 29.

23. The document prepared by Mr. Sutton which released aircraft 29 for flight.

24. All loads and stress analyses of the wing flap system of IAI model 1123 Jet Commander.

Affidavit of Dennis C. Murphy in Support of Motion to Dismiss Complaint

The existence of many of the requested documents has been acknowledged by Israel Aircraft Industries employees in their depositions.

The requested documents concern the key issue in this case, i.e., the extent and effect of IAI's modifications to aircraft 29 after it was purchased from North American Rockwell.

The Defendants will be severely prejudiced if these documents are not produced.

Wherefore it is respectfully requested that Plaintiffs serve answers to Defendants' interrogatories and produce the requested documents or in the alternative that the Court dismiss the Plaintiff's Complaint with prejudice.

/s/ DENNIS C. MURPHY
Dennis C. Murphy

(Sworn to October 1, 1974.)

Exhibit 1 Annexed to Foregoing Affidavit

(Extracts From Defendants' Interrogatories)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YOPK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that each plaintiff is required to answer the following applicable interrogatories, under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure. These are continuing interrogatories, and supplemental answers thereto up to the time of trial are required.

1. State your full name, and also the name you customarily use.

2. Please state your residence address and telephone number,

(a) at the present time, and

(b) at the time of the accident.

3. Please state the name, address and telephone number of your place of employment and type of work,

(a) at the present time, and

(b) at the time of the accident.

4. Have you ever been known by any other names, including any alias or assumed name?

Exhibit 1—Extracts from Defendants' Interrogatories

(a) If your answer is "yes", please state such names, your residence addresses when used, and the approximate inclusive dates when used.

(b) Give the reason for each change of name.

5. What is your age, birthdate, place of birth (City, County and State, or what Country), and the exact name appearing on your birth certificate?

6. Please list in chronological order the residence address where you have resided in the past ten years indicating the approximate dates you resided at each address, commencing with the present.

7. In connection with your marital status, please state:

(a) If single, married, widowed, or divorced,

(1) at the time of the accident, and

(2) at the present time.

(b) If married, give the full name and age of your spouse and date and place of marriage, and last known address of spouse if separated,

(1) at the time of the accident, and

(2) at the present time.

(c) If you have children, give the names and ages of your children and who has custody of them.

(d) If you have ever been married to someone else other than in your answer to (b) above, please list to whom, when, and where, for what approximate period of time by dates, and whether the marriages were terminated by death, divorce or annulment.

Exhibit 1—Extracts from Defendants' Interrogatories

(e) If you have ever been divorced, please state on each occasion when and in what city and state you were divorced and the last known address of each former spouse.

(f) If a divorce action or actions were ever filed but not concluded, state when and where they were filed and the names of the parties to each divorce action.

* * * * *

* * * component parts failed to conform to the detailed specifications of a similar model aircraft?

95. If so, describe fully the nature, substance and source of such evidence giving the names and addresses of any witnesses able to so testify and identify any documents tending to establish such facts.

96. Are the plaintiffs or their counsel aware of any evidence showing that the aircraft as described in plaintiff's Complaint was dissimilar to any other aircraft sold or delivered on or before January 21, 1970 in any respect affecting its safe operations?

97. Are the plaintiffs or their counsel aware of any evidence tending to show that the aircraft as described in plaintiff's Complaint at the time of its sale contained any hidden defects or dangers unknown to the purchaser or user?

98. If so, describe fully the nature, substance and source of such evidence giving the names and addresses of any witnesses able to so testify and identify any documents tending to establish such facts.

99. If the answers to any of the Interrogatories Numbers 92 through 99 are in the affirmative, are plaintiffs or

their counsel aware of any evidence tending to show that such noncompliance caused or contributed to the crash of the aircraft as described in plaintiff's Complaint?

100. If so, describe fully the nature, substance and source of such evidence giving the name and address of any witnesses able to so testify and identify any documents tending to establish such facts.

Dated: New York, New York
June 12, 1974

MENDES & MOUNT

By .....
A Member of the Firm
Attorneys for Defendants
STANDARD PRECISION, A DIVISION OF ELECTRONIC COMMUNICATIONS, INC.

Exhibit 2 Annexed to Foregoing Affidavit

Notice of Defendants' Production of Documents, dated July 5, 1973, printed above at pages 58a-60a.

Affidavit of William L. Schierberl in Opposition to Motion to Dismiss

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

William L. Schierberl, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Condon & Forsyth, attorneys for plaintiff Israel Aircraft Industries, Ltd., and I am fully familiar with all of the facts and proceedings in this case.

2. This affidavit is submitted in opposition to defendants' Motion to Dismiss the Complaint pursuant to Rule 37(d) of the Federal Rules of Civil Procedure and in support of plaintiffs' Motion for a Protective Order pursuant to Rule 26(c) of the Federal Rules of Civil Procedures and for such other and further relief as to the Court may appear just and proper.

3. Sixteen months ago, on June 1, 1973, my firm served a Notice on behalf of the plaintiffs seeking the depositions of thirteen persons associated with the several defendants who possessed relevant and necessary information concerning the facts which are at issue in this case. Only four of these witnesses has been produced for deposition. Even these witnesses were not deposed until, after almost a year of delay by defendants, this Court ordered at a conference on May 28, 1974, that the discovery be concluded by July 15, 1974.

Affidavit of William L. Schierberl in Opposition to Motion to Dismiss

4. On July 5, 1973, defendants' counsel served a Notice of Taking Depositions of fourteen persons, most of whom were employees of Israel Aircraft Industries, Ltd. In response, seven witnesses have been brought to New York from Israel and have submitted to depositions by defendants' counsel. These witnesses possessed personal knowledge which, together with records previously produced, covered all essential relevant aspects of the events in question.

Further, all seven of the witnesses who appeared and testified for the plaintiffs occupy responsible posts in Israel Aircraft Industries, Ltd., a critical industry in the State of Israel. These key personnel were produced during a time when their Company was recovering from the effects of losses and delays caused by the recent Mid-East conflict.

5. The following is a brief analysis of what has been accomplished with respect to the fourteen persons noticed by defendants for depositions:

a. Mr. Hagai Koren, co-pilot of the Israel Aircraft Industries experimental Jet Commander 029 the loss of which on January 20, 1970 gave rise to this action, and who is currently a test pilot for the Company as well as an officer and pilot in the Israeli Air Force, was produced in New York and his deposition completed by defendants' counsel on September 5, 1974.

b. Mr. Zohar Landau, test engineer aboard Jet Commander 029 on January 20, 1970 and currently a flight test engineer for Israel Aircraft Industries, Ltd., came from Israel and gave his testimony at a deposition in New York on July 22, 1974.

Affidavit of William L. Schierberl in Opposition to Motion to Dismiss

c. Mr. Mordechai Muscatel, a Test Technician aboard the last flight of Jet Commander 029 on January 20, 1970 and still employed as a technician with Israel Aircraft Industries, Ltd. in Israel gave his testimony at a deposition in New York on July 24, 1974.

d. Mr. Leon Jacobi was Project Manager for development of the Jet Commander aircraft by Israel Aircraft Industries, Ltd. and is presently Project Manager for development of a current model of the aircraft. Mr. Jacobi took a week from his duties in Israel to give his testimony in New York on July 3, 1974.

e. Mr. Moise Blumkin, was head of the Mechanical Design Department for Israel Aircraft Industries, Ltd. in January 1970 and is presently a Vice President and Director of Engineering for his Company. Mr. Blumkin came to New York and was deposed by defendants' counsel on July 23 and July 24, 1974.

f. Mr. Reginald Sutton, who is the Director of Quality Assurance for Israel Aircraft Industries, Ltd. held the same position in January, 1970. Mr. Sutton came to New York and gave his testimony at a deposition conducted by defendants' counsel on August 7, 1974.

g. Dr. Baruch M. Cina is the Chief Metallurgist in materials and processing engineering for Israel Aircraft Industries, Ltd. and served the Company in the same capacity in January, 1970. Dr. Cina's responsibilities include the management of a department of thirty people, all engaged in metallurgy, and he left these duties to come to New York where his deposition was taken by defendants' counsel on August 1, 1974.

Affidavit of William L. Schierberl in Opposition to Motion to Dismiss

6. The remaining persons noticed for deposition by defendants either cannot, or, it is respectfully submitted, should not be required to appear for the reasons which follow:

a. Mr. Avraham Hacohen, who was the pilot of Jet Commander 029 at the time of the crash and chief test pilot for Israel Aircraft Industries, Ltd. died in 1972.

b. Mr. M. Sivan, who was in the Aerodynamics Department of Israel Aircraft Industries, Ltd. was under the supervision of both Mr. Jacobi and Mr. Blumkin. Any information possessed by Mr. Sivan was also known to his superiors each of whom testified at length.

c. Mr. Y. Gur-Lavi, who was a member of the flight test department of Israel Aircraft Industries, Ltd. is no longer in the employ of that Company and, therefore, is not subject to the control of plaintiff.

d. Mr. A. Offer of the Aeroelasticity Department of Israel Aircraft Industries, Ltd. was also under the supervision of the Project Manager, Mr. Y. Jacobi, who testified in detail. Mr. Offer's testimony would only be cumulative.

e. Again, in the case of Mr. Gilboa, of the Inspection Department of the Manufacturing Division of Israel Aircraft Industries, Ltd., any information in his possession would be cumulative to that of his supervisor, Mr. R. Sutton, the head of the Department who answered all questions put to him by defendants' counsel at his deposition on August 7, 1974.

f. Mr. Nachum Yahalom is also a Test Pilot for Israel Aircraft Industries, Ltd. but he was not aboard

the Jet Commander 029 on January 20, 1974 and possess no information which could not have been obtained from members of the crew all of whom appeared and testified.

g. Mr. J. Czinczenheim who served as an Aerodynamics Consultant with Israel Aircraft Industries, Ltd. is no longer in the employ of that Company and no longer lives in Israel. Mr. Czinczenheim is, therefore, not subject to the control of plaintiff.

h. Finally, Mr. M. Ackerman of the Mechanical Design Department of Israel Aircraft Industries, Ltd. was under the supervision of Mr. Blumkin who gave his testimony in New York on July 23 and July 24, 1974. Every area of which Mr. Ackerman would have knowledge was covered. Here again, the testimony could only be cumulative.

7. All of the plaintiffs' witnesses have been produced at the convenience of defendants' counsel in New York and at substantial cost in lost time to Israel Aircraft Industries, Ltd. All of the persons who appeared and testified on behalf of plaintiffs were key witnesses who possessed relevant information pertaining to the facts on which this case is based. Further, the defendants delayed for over a year in commencing the depositions and did not produce a single witness until a deadline had been set by this Court. Now, on the eve of trial, defendants improperly seek sanctions on the ground that plaintiffs have failed to produce witnesses whose area of knowledge has been covered by other witnesses, who are no longer under plaintiffs' control or, as in one case, is no longer living. Defendants by their present application ask that Mrs. Myriam Rosen be re-

quired to appear and give testimony in New York even though Mrs. Rosen has never been noticed by the defendants.

8. Plaintiffs have already produced seven witnesses all of whom possessed particular essential skills vital to the operation of the most critical industry in their Country. Any further depositions would be an unnecessary burden and expense not only for the plaintiffs but for their Country.

9. On the basis of the authority analyzed in the annexed Memorandum of Law, the legal basis for defendants' Motion is unsound. Defendants' application is made pursuant to Rule 37(d) of the Federal Rules of Civil Procedure. The persons whom defendants seek to depose are not within the categories specifically provided in Rule 37 (d). That Rule relates to the deposition of ". . . a party or an officer, director, or managing agent of a party or a person designated under Rule 30(d) (6) or 31(a) . . ." Of those persons who are the subject of this untimely application by defendants, none are officers, directors, or managing agents of Israel Aircraft Industries, Ltd.

10. Further, plaintiffs' Cross-Motion for a Protective Order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure should be granted to prevent further efforts by defendants to seek additional depositions, for purposes of delay, after discovery should have been closed. Defendants have had almost two years to complete their discovery but did nothing except delay until trial became imminent.

Affidavit of William L. Schierberl in Opposition to Motion to Dismiss

WHEREFORE, it is respectfully submitted that defendants' Motion to Dismiss the Complaint should be denied in all respects and the plaintiffs' Cross-Motion for a Protective Order should be granted along with any further relief which to this Court may appear just and proper in the circumstances.

/s/ WILLIAM L. SCHIERBERL
William L. Schierberl

(Sworn to October 3, 1974)

Affidavit of Marshall S. Turner in Opposition to Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Marshall S. Turner, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and associated with the firm of Condon & Forsyth, attorneys for plaintiff Israel Aircraft Industries, Ltd., and I am fully familiar with all the facts and proceedings in this case.

2. This affidavit is submitted in opposition to defendants' Motion to Dismiss the Complaint pursuant to Rule 37(d) of the Federal Rules of Civil Procedure and in support of plaintiffs' Cross-Motion for a Protective Order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

3. Sixteen months ago, on June 4, 1973, my firm served a Notice on behalf of plaintiffs seeking the Production of Documents in the possession of the several defendants concerning the facts which are at issue in this case. Several document marking sessions took place on July 18, 1973, August 29, 1973 and January 10, 1974, at which time defendants produced a substantial number of documents pursuant to plaintiffs' Notice.

4. On July 5, 1973 defendants' counsel served a Notice for the Production of Documents upon the counsel for Israel Aircraft Industries, Ltd. In response, on January

10, 1974 and at various subsequent depositions, plaintiffs produced a substantial number of documents, which constituted all the documents in its possession which relate to the facts of this case.

5. The affidavit of Dennis Murphy, counsel for defendants, submitted in support of this Motion to Dismiss the Complaint sets forth 24 areas in which plaintiffs have purportedly failed to comply with defendants' Notice. The following is a brief analysis of each and every point raised in Mr. Murphy's affidavit and plaintiffs' responses thereto:

(1) Plaintiffs have produced all minutes of the testimony before the Ministry of Transport, which are in its possession. Any additional documents are public documents to which defendants have the same access as plaintiffs. Additionally, defendants' seek English translations of said minutes, which would result in considerable expense. This is an expense which must be borne by defendants' counsel in the preparation of their case.

(2) All documents relating to plaintiffs' investigation into the accident alleged in the Complaint were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(3) Upon information and belief the personal counsel for plaintiffs Landau, Muscatel and Koren have transmitted or are in the process of transmitting all personnel records to defendants' counsel.

(4) The type certificate data sheet for the subject aircraft was produced by plaintiffs on January 10, 1974. If defendants wish additional type certificate informa-

tion, it is readily available from the United States and Israeli governments since they are public documents to which the defendants have the same access as plaintiffs.

(5) Upon information and belief the personal counsel of the crew members has produced or is in the process of producing all reports of physical examinations.

(6) The metallurgical report of Dr. Cina was produced on January 10, 1974. Photocopies of the photographs were also produced at that time. Photographic copies of the photographs are presently being made and plaintiffs will transmit them in the near future.

(7) All documents delivered to Comprehensive Design International were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(8) Documents received from Comprehensive Design International have been produced in the form of Israel Aircraft Industries, Ltd. documents. If defendants identify specific Comprehensive Design International documents, plaintiffs will search their records and attempt to provide same.

(9) All documents relating to aircraft 029 modifications were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(10) All of the appendices to the Israel Ministry of Transport accident report in the possession of plaintiffs were produced on January 10, 1974 and on subsequent occasions in the course of depositions, along with translations which were made at considerable expense to plaintiffs. Any additional appendices, not in

the possession of plaintiffs are public documents to which defendants have the same access as plaintiffs.

(11) All accident reports in the possession of Israel Aircraft Industries, Ltd. were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(12) All flight test plans in the possession of Israel Aircraft Industries, Ltd. were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(13) All documents relating to evaluation of the wing flap system were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(14) All documents relating to evaluation of the wing flap system were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(15) All documents relating to the decision to use and install Standard Precision actuators on aircraft 029 were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(16) All documents relating to removal of shear pins were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(17) All documents relating to loads and stress analysis of aircraft 029 were produced on January 10, 1974 and on subsequent occasions in the course of depositions. Defendants have been advised that plaintiffs have obtained one additional report which is being

translated and will be transmitted to defendants when the translation is completed.

(18) All documents relating to the flight tests were produced on January 10, 1974 as well as on subsequent occasions in the course of depositions. Additionally, the report referred to in paragraph (17) above may be relevant on this subject and will be produced.

(19) Photostatic copies of all photographs of aircraft 029 were produced on January 10, 1974 and on subsequent occasions in the course of depositions. Additionally, as previously stated, photographic copies of photographs are in the process of being made and will be transmitted to defendants when available.

(20) All documents relating to conduct, training and uniforms of participants in flight tests have been testified to by the three crew members at their depositions. Upon information and belief all documents relating thereto have been produced or are no longer available in the files of Israel Aircraft Industries, Ltd.

(21) Upon information and belief there was no flight recorder aboard aircraft 029 during the flight tests. However, copies and translations or various other recording devices, including the "tower tape read-out", were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

(22) All documents exchanged between the Israel C.A.A. and Israel Aircraft Industries, Ltd., which are in the possession of plaintiffs, were produced on January 10, 1974 and on subsequent occasions in the course of depositions.

Affidavit of Marshall S. Turner in Opposition to Motion to Dismiss Complaint

(23) The specific document referred to in Mr. Murphy's affidavit was produced on January 10, 1974 and again produced and identified by Mr. Sutton at his deposition on August 7, 1974.

(24) All documents in the possession of plaintiffs relating to loads and stress analysis of the wing flap system were produced on January 10, 1974 and on subsequent occasions in the course of depositions with the exception of the report referred to in paragraph (17) above, which shall be provided.

6. As is readily observable from the above analysis of all points raised in the affidavit of Dennis Murphy in support of the motion, all documents, which are in the possession of plaintiffs, have been produced or, as in the case of the photographs and the one technical report referred to above, will be produced in the near future and defendants' counsel have been so advised.

7. Defendants further allege that plaintiffs have failed to answer defendants' interrogatories. Plaintiffs' counsel is puzzled by this allegation since a verbal agreement was entered into and reaffirmed on several occasions whereby defendants agreed that answers to their interrogatories would be required only if, after the completion of depositions, defendants' counsel specifically requested answers to interrogatories which had not been answered at the depositions. In this regard, defendants' interrogatories were served on June 12, 1974 on the eve of commencement of the extended schedule of depositions of witnesses on behalf of both sides. It was agreed that most, if not all, of the interrogatories could be fully answered at the depo-

sitions of plaintiffs. It was further agreed that defendants would specify those interrogatories which required further answers at the conclusion of the depositions. To date, defendants' counsel has not specified which, if any, interrogatories require further answers.

8. It is apparent from this motion, as well as a similar motion which was returnable before this Court on October 4, 1974, that despite the fact that there has been full, open and extensive discovery in this case, defendants' counsel's objectives are no longer to pursue the facts of this case, but rather to harass plaintiffs and impose unnecessary burdens and expenses upon them.

9. Defendants have had two years to complete discovery, but have done nothing except to delay all attempts by plaintiffs' counsel to proceed forthwith. Now, on the eve of trial, defendants improperly and unjustifiably seek sanctions, to which they are not entitled, in a blatant attempt to delay the trial and wear down their opposition.

WHEREFORE, it is respectfully submitted that defendants' Motion to Dismiss the Complaint should be denied in all respects and the plaintiffs' Cross-Motion for a Protective Order should be granted along with any further relief which to this Court may appear just and proper in the circumstances.

/s/ MARSHALL S. TURNER
Marshall S. Turner

(Sworn to October 8, 1974.)

Reply Affidavit of Dennis C. Murphy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

DENNIS C. MURPHY, being duly sworn, deposes and says that I am an attorney associated with the firm of Mendes & Mount, attorneys for the Defendants, and am fully familiar with the facts of this action.

This Affidavit is submitted in reply to Plaintiff's affidavit in opposition to Defendant's Motion to Dismiss the complaint returnable October 11, 1974.

Defendant's Notice for Production of Documents dated July 5, 1973, (Exhibit A to defendant's Motion to Dismiss) called for the production of all "reports, specifications, drawings, photographs, records . . . or tangible things in the possession or control of any of the plaintiffs relating to the . . . modifications . . . of the aircraft indentified in the complaint, or any component part thereof."

Defendants have repeated their request for all reports, correspondence, documents, and drawings, relating to aircraft 29's modifications, on the record during depositions of plaintiff's representatives.

The Plaintiff's attorney in his memorandum of law, page four states: "Plaintiffs produced all the documents called for in . . . Defendant's Notice of Production of Documents." This assertion is incorrect. Exhibit A, attached, was marked as Defendant's Exhibit E for identification on July 23, 1974 at the deposition of Mr. Blumkin of the IAI Mechanical Design Department. This IAI report de-

scribes the numerous modifications which IAI completed on aircraft 29 and lists individually 159 engineering drawings that detail the many modifications made to the aircraft before flight.

The central issue in this case is the nature and extent of the modifications to the subject aircraft by IAI. The defendants will be severely prejudiced if they are not fully apprised of the exact modifications and alterations of the aircraft because it is the defendants' contention that the modifications were substantial and contributed to the loss of this aircraft. If the drawings are not produced, the full extent and effect of the modifications cannot be ascertained by the Defendants.

These drawings are clearly within the possession, custody, and control of the plaintiffs in that IAI originated these drawings. Furthermore, the project manager of IAI, Mr. Jacobi, in his deposition of July 30, 1974, stated that all control drawings relating to the modifications of aircraft 29 were maintained in the archives of IAI.

Plaintiffs in their memo of law stated that they have produced all relevant documents in their possession. The law is clear that actual possession of documents or things is not necessary, if the party has control of them. It is quite clear in this case that the plaintiffs have complete control of the requested documents. The mere fact that these documents are not presently resting in the plaintiff's attorney's office is of no significance.

To date, Plaintiffs have produced approximately 20 of the above drawings.

The defendants are entitled to inspect all 159 IAI drawings indicating changes to the subject aircraft; however, in the interest of concluding discovery as soon as possible, the defendants only request the following additional draw-

ings which are listed under the drawing breakdown, which is part of the IAI report No. 4650/2827A. (See Exhibit A)

A. Drawing No. 5703504, Mod. Flap Actuator Instl. comp. change B

B. Drawing No. 2703032, Swivel Flap Actuator advance change B

C. Drawing No. 4703505, Bracket-Flap Act. Inner, comp. change A

D. Drawing No. 4703506, Bracket-Flap Act. Outer, comp. change A

E. Drawing No. 4703507, Adaptor-Block Flap Act, comp. change A

F. Drawing No. 4703508, Adaptor-Block Flap Act, comp. change A

G. Drawing No. 3703509, Angle-Flap Act. comp. change A

H. Drawing No. 3703510, Angle-Flap Act. comp. change A

I. Drawing No. 3703511, Shim Flap Act. new change

J. Drawing No. 3703512, Shim Flap Act. new change

K. Drawing No. 3703513, Shim Flap Act. advance change A

Defendants also require the production of the adaptor connecting the inboard actuator to the right hand wing of aircraft 29. This component was recovered from the aircraft wreckage and examined by IAI's chief metallurgist, Dr. Cina. The results of the examination of this part and other recovered parts were revealed in his report No. 14697

which was marked August 31, 1974 as Defendant's Exhibit T for identification. The Plaintiffs have produced some but not all of the recovered parts of the flap mechanism of aircraft 29. This adaptor was designed by IAI and attached to the defendant's actuator. Defendants contend that this adaptor contributed to the loss of the aircraft and it is imperative that Defendants have a similar opportunity to examine this small component. It would be patently unjust to allow one party to examine a critical component and deny the adverse party this right.

Defendants also request an opportunity to inspect and copy all photographs taken of the parts recovered from the wreckage by Dr. Cina. In Dr. Cina's report, referred to above, he examined nine recovered parts. In his report he refers to 42 photographs which were taken of these recovered parts. In that all of the recovered parts were not made available to the Defendants, it is imperative that Defendants have an opportunity to examine all of the photographs taken of these parts. In Dr. Cina's deposition he stated that these photographs were available and the Plaintiff's attorneys indicated that we would receive copies of these photographs.

Defendants served a set of 100 interrogatories on the Plaintiffs on June 12, 1974. Some of the interrogatories have been answered in Plaintiff's depositions. The following 15, numbered interrogatories have not been answered, or were insufficiently answered.

57. This interrogatory relates to unemployment disability compensation received by the Plaintiffs from the State of Israel.

58. This interrogatory concerns insurance policies and benefits received by Plaintiffs.

Reply Affidavit of Dennis C. Murphy

59. This interrogatory asks for written reports supporting Plaintiff's claims for benefits.

64-68. (incl.) These interrogatories concern the specific acts or omissions constituting the alleged negligence of the Defendants. Plaintiffs' complaint is much to vague concerning these allegations.

69. This interrogatory concerns the manner in which it is claimed that the aircraft flap system malfunctioned.

70-74. (incl.) These interrogatories ask for specifics concerning claims of breach of express and implied warranties.

78. This interrogatory asks if there is a claim of notice.

The Israeli Ministry of Transport compiled an official accident report relating to the crash of aircraft 29. This document included 14 appendices. The report was produced along with some of the appendices. The appendices are vitally important in order to understand the report. The Plaintiff, Israel Aircraft Industries, Ltd., is owned by the State of Israel; the Ministry of Transport is an agency of the State of Israel. It is obvious that all appendices to the report are available to IAI because the State of Israel controls both organizations. Plaintiff's statement that all the appendices are not in their possession is legally insufficient as an excuse for not producing them. Plaintiffs have provided Defendants with most of the fourteen appendices to the report and because all of them are in the control and custody of Plaintiffs, it is again requested that appendices numbered 3, 6, 11 and 14 be produced in Hebrew at Defendant's expense.

Paragraph 5(1) of Plaintiff's affidavit dated October 8, 1974, states that there was no flight recorder aboard air-

craft 29. The Israel Ministry of Transport accident report, which has been marked for identification, states on page 5 paragraph 9(b): "The following recorders were installed in the aircraft: 4 units of recorder type A 1322, manufactured by ACB. This is a recorder of the photo-paper type checking 33 parameters." The data from this recorder is obviously in the possession, custody and control of the Plaintiffs, and Defendants have a right to see the flight data of aircraft 29 on its final flight.

The request for the above items is not, as suggested by the plaintiff's attorneys, an attempt to harass the Plaintiffs or delay the trial. Had these relevant items been produced pursuant to Defendant's Notice to Produce served fifteen months ago, Defendants would not have been compelled to make this motion. The Defendants have cooperated fully in producing all documents requested by Plaintiffs.

All expenses incurred in producing the above items will be paid for by the Defendants.

WHEREFORE, in view of the fact that these documents, the adaptor, and Dr. Cina's photographs are relevant and essential to the defense of this law suit, it is respectfully requested that the Court, in its discretion, order Plaintiffs to comply with Defendant's request.

/s/ DENNIS C. MURPHY
Dennis C. Murphy

(Sworn to October 25, 1974)

[EXHIBITS OMITTED]

Affidavit of William L. Schierberl in Response to Reply Affidavit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

William L. Schierberl, being duly sworn, deposes and says:

I am a member of the bar of this Court and of the firm of Condon & Forsyth, attorneys for plaintiff Israel Aircraft Industries, Ltd., and submit this Affidavit in response to the Affidavit filed herein by defendants' counsel on October 25, 1974. This Affidavit is necessary because of inaccuracies in the defendants' untimely Reply Affidavit.

1. Defendants' Reply Affidavit refers to a list of 159 engineering drawings of Israel Aircraft Industries, Ltd. and states that defendants will be prejudiced as a result of an alleged failure by the plaintiffs to produce these drawings. The facts are that on July 2, 1974, I asked defendants' counsel, Dennis C. Murphy, Esquire, if there were any additional drawings which he desired to be produced. Mr. Murphy provided a list, written in his own hand, setting forth the identifying numbers of the drawings which he required. Mr. Murphy's list is annexed hereto as Exhibit "A".

On August 5, 1974, after the expenditure of considerable time and expense in searching its archives for the additional drawings requested, plaintiffs produced every document. A copy of the letter of transmittal with respect to these drawings is annexed to this Affidavit as Exhibit "B".

Affidavit of William L. Schierberl in Response to Reply Affidavit

No additional drawings were at any time requested by defendants.

2. Further, defendants now request, for the first time and by means of Reply Affidavit, production of ". . . the adaptor connecting the inboard actuator of the right hand wing of aircraft 029.". This part was never considered significant in the actuator failure which is the basic issue in this case. I have not seen this component and I do not know where it is located at this time. While the plaintiffs have made every effort to comply with all requests for relevant material by the defendants, this new demand after the date of trial has been set and adjourned at defendants' request, is untimely and unreasonable and can only serve to further delay.

3. Defendants also request photographs which were exhibits to the report of Dr. Baruch M. Cina, Chief Metallurgist of Israel Aircraft Industries, Ltd. As stated in the Affidavit of my associate, Marshall S. Turner, in Opposition to defendants' second Motion to Dismiss, that of September 30, 1974, the photographs were at that time in the process of being duplicated. Copies of these were forwarded to defendants' counsel on October 29, 1974 as appears from our letter of transmittal annexed hereto as Plaintiffs Exhibit "C".

4. Defendants' Reply Affidavit seeks answers to 15 interrogatories of the original 100 Interrogatories, served by defendants. As stated in my Affidavit of Opposition of October 3, 1974, it was agreed between counsel for the respective parties that the interrogatories need not be answered until the depositions had been completed and

defendants had requested answers to those interrogatories which had not been answered in the course of the depositions. The list of specific interrogatories which defendants regard as unanswered is presented for the first time in defendants' Reply Affidavit. This is a completely unnecessary imposition upon the Court as the defendants are clearly entitled to answers to these interrogatories and these answers are being prepared as they would have been if the narrowed list had been referred to us directly.

5. Defendants now request production of Appendices 3, 6, 11 and 14 to the Report of the Israeli Ministry of Transport. These are public documents which defendants have apparently made no attempt to obtain on their own initiative. Most are in the Hebrew language and must be translated, however:

Appendix 3 is identified in the official report as containing the minutes of testimony. When deposed in New York, Dr. Cina and Mr. Leon Yehuda Jacobi produced the minutes of the testimony which they gave before the committee of the Ministry of Transport. I do not know of any additional minutes.

Appendix 6 was produced on July 23, 1974 in the course of the deposition of Mr. Moise Blumkin, of plaintiff Israel Aircraft Industries, Ltd.

Appendix 11 was produced in the course of the deposition of Mr. Hagai Koren of Israel Aircraft Industries, Ltd. taken in New York on September 5, 1974.

Appendix 14, as stated in the Affidavit in Opposition of Mr. Turner dated October 8, 1974, is in the process of being translated from the Hebrew language into English and will be furnished to defendants' counsel as soon as it is finished.

Affidavit of William L. Schierberl in Response to Reply Affidavit

6. Defendants additionally request data from the aircraft flight recorder. There was no "flight recorder" as the term is normally used in the aviation industry aboard aircraft 029. There were recordings made of radio communications between aircraft 029, a chase plane which was behind aircraft 029 and the control tower at Lod International Airport in Tel Aviv. Transcripts and translations of these recordings were produced at the deposition of Mr. Koren. The "four units of recorder Type A 1322 . . ." referred to in defendants' Reply Affidavit were, as defendants' counsel has already been informed, totally destroyed when aircraft 029 crashed into the ground.

7. In summary, there is no validity to any of the claims by defendants of failure on the part of the plaintiffs to fully disclose. As refuted in detail in the two Affidavits before the Court in Opposition to plaintiffs' pending motions, every item demanded has either been produced, is not within the care, custody or control of the plaintiffs, is in the process of being produced, or does not exist. Further, all of this could have been accomplished by communication between counsel.

It is, therefore, respectfully submitted that the pending motions for further discovery which have been made after the date set by this Court for completion of discovery and after at least one trial date has been adjourned at the request of the defendants, are without merit, untimely and unnecessary. Accordingly, it is respectfully requested that these applications be denied in all respects.

/s/ William L. Schierberl
William L. Schierberl

(Sworn to November 1, 1974.)

Exhibit A Annexed to Foregoing Affidavit

(Requested Drawings)

Requested Drawings — July 2, 74

Drawing Number

5703514
5103401
5173521
5173522
5193502
5193530
5193532
5173528

Request authorization to
obtain Medical Records of Plaintiffs.

Dx FF 1-10-74

/s/ Dennis Murphy

Exhibit B Annexed to Foregoing Affidavit

(Letter Dated August 5, 1974)

August 5, 1974

Dennis C. Murphy, Esq.
Mendes & Mount
27 William Street
New York, New York 10005

RE: Israel Aircraft Industries, Ltd., Zohar Landau, Nira Landau, Mordechai Muscatel, Zila Muscatel, Hagai Koren, and Dalia Koren

—v—

Standard Precision A Division Of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation

United States District Court
Southern District of New York

Dear Dennis:

As you requested in the course of the recent depositions, we are transmitting, with this letter, the following additional drawings:

IAI	5703514
"	3103401
"	5193502
"	5193530
"	5193532
"	5173528

Sincerely yours,

William L. Schierberl

WLS:dg

Exhibit C Annexed to Foregoing Affidavit

(Letter Dated October 29, 1974)

October 29, 1974

Dennis C. Murphy, Esq.
Mendes & Mount
27 William Street
New York, New York 10005

RE: Israel Aircraft Industries, Ltd., Zohar Landau, Nira Landau, Mordechai Muscatel, Zila Muscatel, Hagai Koren, and Dalia Koren

—v—

Standard Precision A Division Of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation

United States District Court
Southern District of New York
Our File No. 5054

Dear Dennis:

Enclosed herewith please find copies of the photographs which were annexed to the metallurgical report of Dr. Cina.

The translation of the technion report still has not been received. We shall provide it to you as soon as the translation has been completed.

Exhibit C—Annexed to Foregoing Affidavit

Further, in accordance with our agreement for exchange of the reports prepared by our respective experts, please forward to us a copy of the report by Dr. Tetelman of Failure Analysis Associates.

Very truly yours,

William L. Schierberl

WLS:dg
Enclosure

Memo Endorsed on Defendants' Motion to Dismiss for Failure to Comply With Notice of Taking Depositions

11/15/74

Motion denied

So Ordered

Robert L. Carter
U S D J

Filed Nov 19, 1974

Memo Endorsed on Defendants' Motion to Dismiss for Failure to Produce Documents

11/15/74

Motion denied

So Ordered

Robert L. Carter
U S D J

Filed Nov 19, 1974

Pre-Trial Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

On December 31, 1974, the attorneys for all the parties to this action appeared at a conference pursuant to the Local Rules of the United States District Court for the Southern District of New York and Rule 16 of the Federal Rules of Civil Procedure and the following action was taken:

I. The parties stipulated that the following facts are not in dispute in this action.

STIPULATED FACTS

1. Plaintiff Israel Aircraft Industries, Ltd. at all times mentioned in the Amended Complaint was and is a corporation organized and existing under and by virtue of the laws of the State of Israel and has its principal place of business at Lod Airport in Israel.
2. Plaintiffs, Zohar Landau, Nira Landau, Mordechai Muscatel, Zila Muscatel, Hagai Koren and Dalia Koren were and still are citizens of the State of Israel.
3. Defendant Standard Precision, Inc. was a corporation incorporated under the laws of the State of Kansas and had its principal place of business in the State of Kansas.

4. Defendant Standard Precision, Inc. became a division of Electronic Communications, Inc. on September 30, 1965, and thereafter carried on its business and became known as Standard Precision A Division of Electronic Communications, Inc.

5. Defendant Electronic Communications, Inc., subsequently acquired by merger defendant Standard Precision, Inc. and thereby or otherwise assumed the liabilities, obligations and penalties of Standard Precision, Inc.

6. Defendant Electronic Communications, Inc. at all times mentioned in the Amended Complaint was and is a corporation incorporated under the laws of the State of New Jersey and has its principal place of business in the State of Florida.

7. Defendant Electronic Communications, Inc. at all times mentioned in the Amended Complaint was and is doing business in the State of New York.

8. Defendant The National Cash Register Company, subsequently acquired by merger defendant Electronic Communications, Inc.

9. Defendant The National Cash Register Company at all times mentioned in the Amended Complaint was and is a corporation incorporated under the laws of the State of Maryland and has its principal place of business in the State of Ohio.

10. Defendant The National Cash Register Company presented to the Secretary of State of the State of New York the necessary statement and designation with a copy of its certificate of incorporation duly

certified, and procured from the said Secretary of State a certificate of authority stating among other things that the defendant The National Cash Register Company is authorized to do business in the State of New York which authorization, at all times mentioned in the Amended Complaint was and is maintained by defendant The National Cash Register Company.

11. North American Rockwell Corporation was at all times mentioned in the Amended Complaint a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

12. Defendant North American Rockwell Corporation presented to the Secretary of State of the State of New York the necessary statement and designation with a copy of its certificate of incorporation duly certified, and procured from the said Secretary of State a certificate of authority stating among other things that the defendant North American Rockwell Corporation is authorized to do business in the State of New York which authorization, at all times mentioned in the Amended Complaint was and is maintained by defendant North American Rockwell Corporation.

13. This is a civil action wherein the matter in controversy exceeds, exclusive of interest and costs the sum of Ten Thousand ($10,000) Dollars.

14. Jurisdiction of the Court is invoked under §28 U.S.C. 1332(a)(2).

15. Plaintiff Israel Aircraft Industries, Ltd. at all times mentioned in the Amended Complaint was and is engaged in the manufacture and sale of aircraft.

16. Defendant Standard Precision, Inc. at all times mentioned in the Amended Complaint was engaged in the manufacture and sale of aircraft components.

17. At all times mentioned in the Amended Complaint defendant North American Rockwell Corporation was engaged in the business of the manufacture and sale of aircraft and aircraft components.

18. Plaintiff Israel Aircraft Industries, Ltd. and defendant North American Rockwell Corporation were parties to various contracts involving the purchase and sale of certain aircraft and aircraft parts as specified in contracts marked for trial as:

    1. Exhibit X
    2. Exhibit Y
    3. Exhibit AA
    4. Exhibits G-1 through G-4

19. On or about February 13, 1969, Israel Aircraft Industries, Ltd. purchased and took delivery and title from North American Rockwell Corporation, a certain Aerocommander aircraft, model No. 1121 bearing serial No. 29 (hereinafter Aircraft 029).

20. Defendant Standard Precision, Inc. manufactured a certain aircraft Wing Flap System including inboard and outboard Wing Flap Actuator Assemblies bearing North American Rockwell Corporation Specification Numbers 6193044-501 and 6193044-1 respectively and Standard Precision, Inc. Part Numbers 1103572 and 1103573 respectively and both bearing Serial Numbers 127.

21. On or about July 9, 1969, defendant North American Rockwell Corporation, pursuant to its agreements with Israel Aircraft Industries, Ltd., sold to Irsael Aircraft Industries, Ltd. aircraft Wing Flap Systems including inboard and outboard Wing Flap Systems bearing North American Rockwell Corporation Specification Numbers 6193044-501 and 619-3044-1 respectively and Standard Precision, Inc. Part Numbers 1103572 and 1103573 respectively and both bearing Serial Numbers 127.

22. On January 21, 1970, Aircraft 029 was being test flown by the plaintiff Israel Aircraft Industries, Ltd. as part of a program for the United States Federal Aviation Administration and Israel Civil Aviation Administration 1123 type certification.

23. On January 21, 1970, plaintiff Zohar Landau was a member of the crew of Aircraft 029 and was in the employ of plaintiff Israel Aircraft Industries, Ltd.

24. On January 21, 1970, plaintiff Mordechai Muscatel was a member of the crew of Aircraft 029 and was in the employ of plaintiff Israel Aircraft Industries, Ltd.

25. On January 21, 1970, plaintiff Hagai Koren was a member of the crew of Aircraft 029 and was in the employ of plaintiff Israel Aircraft Industries, Ltd.

26. On or about January 21, 1970, following an in-flight malfunction the crew was forced to abandon Aircraft 029, resulting in personal injuries to plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren.

27. On or about January 21, 1970, following an in-flight malfunction Aircraft 029 crashed near Kalkilia, Israel, resulting in the total destruction of Aircraft 029.

28. Pursuant to specifications provided by North American Rockwell Corporation, Standard Precision, Inc. designed, manufactured, tested, inspected and sold the Wing Flap Systems to North American Rockwell Corporation.

29. North American Rockwell Corporation purchased the Wing Flap Systems from Standard Precision, Inc. and incorporated and installed a Wing Flap System on Aircraft 029 and thereafter flight tested and inspected the aircraft and merchandised, promoted and sold Aircraft 029 with this Wing Flap System.

30. Warranties relating to Aircraft 029 and the Wing Flap Systems are as set forth in the appropriate contracts marked for trial as:

    1. Exhibit X
    2. Exhibit Y
    3. Exhibit AA
    4. Exhibits G-1 through G-4

31. At all times mentioned in the Amended Complaint, plaintiff Zohar Landau was married to and living with Nira Landau, as husband and wife.

32. At all times mentioned in the Amended Complaint, plaintiff Mordechai Muscatel was married to and living with Zila Muscatel, as husband and wife.

Pre-Trial Order

33. At all times mentioned in the Amended Complaint, plaintiff Hagai Koren was married to and living with Dalia Koren, as husband and wife.

34. On or about January 7, 1970, plaintiff Israel Aircraft Industries, Ltd. installed aircraft Wing Flap Systems including inboard and outboard Wing Flap Actuator Assemblies bearing North American Rockwell Corporation Specification Numbers 6193044-501 and 6193044-1 respectively and Standard Precision, Inc. Part Numbers 1103572 and 1103573 respectively and both bearing Serial Numbers 127 upon Aircraft 029.

Plaintiffs' Contentions

Plaintiffs contend that defendants are liable for the personal injuries of Zohar Landau, Mordechai Muscatel and Hagai Koren and for the property damage of Israel Aircraft Industries, Ltd., resulting from the crash of Aircraft 029 on January 21, 1970 for the following reasons:

a. Defendants negligently designed, manufactured, tested and inspected the wing flap system and sold it to Israel Aircraft Industries, Ltd.

b. Contrary to the original design and specifications the defendants improperly and inadequately heat treated and finished the Worm Drive of the wing flap actuators.

c. Contrary to the original design and specifications the defendants manufactured the brass nut of the wing flap actuator nut and tube assembly of a improper and inadequate material.

d. Contrary to the original design and specifications the housing of the wing flap actuators was modified by machin-

ing the rear portion of the housing to an inadequate thickness resulting in a weakened condition which was incapable of protecting the worm gears.

e. The quality testing was drastically curtailed from the required minimum period of time of 90 days to the wholly inadequate period of 10 days to enable defendants to meet their contract deadlines. This resulted in misleading and inaccurate testing and an insufficient and dangerous wing flap actuator system.

f. During the period of development, testing and inspection of the wing flap actuator system defects became apparent to defendants as a consequence of which the quality of the wing flap actuator system was not improved but, conversely, defendants lowered the quality and testing standards to enable the qualification of a defective and dangerous system.

g. Defendants breached their express warranties in that the materials used in the fabrication of the wing flap system were not manufactured in accordance with the appropriate plans, specifications and design and were not free from defects in materials and workmanship and were not of merchantable quality and were not fit for the particular uses and purposes for which they were designed, manufactured, tested and inspected.

h. Defendants breached their implied warranties in that the materials used in the manufacture of the wing flap systems were not free from defects in materials, workmanship and design and were not of merchantable quality and were not fit for the particular uses and purposes for which they were designed, manufactured, tested and inspected.

Pre-Trial Order

i. That the defendants designed, manufactured, inspected and tested a defective product and that defect was a substantial factor in causing the injuries and damages to the plaintiffs.

Defendants' Contentions

1. IAI modified aircraft 29 from the original Jet Commander, model 1121/1122 external conformity to a Commodore Jet, model 1123, external conformity.

2. The modifications to the wing flap system of aircraft 29 pursuant to IAI engineering drawings included:

> The Model 1122 flaps were replaced by improved flaps 5193530 basically the same design of double slotted flaps with external hinges. Structurally reinforced, same shape of flap surface and vane surfaces. Hinge point slightly repositioned and relative position of vane flap was altered. Spring load vanes were replaced with fixed vanes. Center section of vane was split into two sections, in order to reduce deflections, and plates replaced with reinforced ones. 1122 vanes were converted accordingly.
>
> The actuators attachment points were changed both at the rear spar and at the flap, geometrically and structurally. Special adapters were introduced for the temporary installation. The flap deflections were altered from 0, 17, 25, and 50 degrees, to 0, 15, 25, and 55 degrees for the initial flight tests. The 1122 limit switches assy was retained.

3. IAI modified the wing flap system of aircraft 29 to accommodate actuators designed by IAI and manufactured by Tally, a U.S. Corporation.

Pre-Trial Order

4. IAI installed the Standard Precision, model 1122 actuators on aircraft 29 while awaiting the manufacture and delivery of the model 1123 actuators designed by IAI and manufactured by Tally Corporation.

5. These IAI adapters referred to above, were fittings designed by IAI to attach to both ends of the Standard Precision, model 1122 actuators. These adapters were then attached to the wing spar and the flap. These IAI adapters repositioned the original attachment points of the S.P., model 1122 actuators in order to obtain an additional 5° of flap extension.

6. Bolts on the adapters contacted the rear of the actuator housings during the three flights of aircraft 29 causing damage to said housings.

7. In the course of modifying the aircraft, IAI removed (4) shear pins from the flexible shaft of the wing flap system.

8. The shear pins were designed by S.P. to protect each of the (4) actuators from being overloaded and damaged.

II. The exhibits which the parties now expect to offer at trial are those contained in the list below. If any party hereafter decides to offer additional exhibits, prompt notice of that fact shall be given to the other parties and to the Court by serving and filing a Supplemental Pre-Trial Order. The Supplemental Pre-Trial Order may be in a short form statement filed with the Clerk of the Court, unless served at trial, in which case it may be filed with the Honorable Robert L. Carter. It shall set forth the reasons why the exhibits were not identified in the Pre-Trial Order.

The parties agree that the following documents may be received in evidence if introduced upon a proper foundation and by an appropriate person and that each party reserves the right to object to the materiality and relevancy of each document and that it is inadmissable under the heresay rule.

PLAINTIFFS' EXHIBITS

Exhibit Number	*Description*	*Prior Identification Number*
1.	2-page document dated 3/8/38	1.
2.	Memo from Mr. Diepenbrock to Mr. McGinnis dated 3/16/68	2.
3.	2-page memo dated 3/18/68 from Mr. Diepenbrock	3.
4.	Memo from Mr. Diepenbrock dated 3/18/68	4.
5.	2-page document dated 3/29/68 from Mr. Diepenbrock to Mr. McGinnis	4.

Exhibit Number	*Description*	*Prior Identification Number*
6.	2-page document dated 4/21/68	6.
7.	Folder of Standard Precision	7.
8.	6-page document dated 5/6/68	8.
9.	2-page document dated 5/10/68	9.
10.	Standard Precision sales release document	10.
11.	1-page document dated 5/13/68	11.
12.	Stop Order	12.
13.	2-page document dated 5/13/68	13.
14.	8-page document entitled "Service Instructions" etc.	14.
15.	Internal letter from Mr. Diepenbrock to Mr. Carder dated 7/29/68	15.
16.	9-page document dated 7/26/68	16.
17.	2-page document dated 9/29/68	17.
18.	Cable	18.
19.	1-page document dated 9/4/68	19.
20.	4-page document, 9/20/68	20.
21.	4-page document, 9/25/68	21.
22.	Minutes dated 12/4/68	22.
23.	3-page document, 12/4/68	23.
24.	Photograph	24.

Exhibit Number	*Description*	*Prior Identification Number*
25.	Photograph	25.
26.	Memo from McGinnis to Carder dated 12/6/68	26.
27.	Letter, 12/10/68	27.
28.	7-page series of writings	28.
29.	Document dated 12/26/68	29.
30.	Document headed "Inter-departmental letter North American Rockwell, Aero-commander Division, 12/28/68	30.
31.	One-page document	31.
32.	Two 186 tags	32.
33.	Series of drawings	33.
34.	Handwritten notes	20A.
35.	Blueprint drawing	34.
36.	Blueprint drawing	35.
37.	Blueprint drawing	36.
38.	One photograph	37.
39.	FAA Form 8100-1	38.
40.	Blueprint drawing	39.
41.	Blueprint drawing	40.
42.	Document entitled "Development Engineering Work Request" dated 11/25/68	41.

Exhibit Number	*Description*	*Prior Identification Number*
43.	Multiple page document entitled "Type Certificate"	42.
44.	Six-page document entitled "Special Repair"	43.
45.	Blueprint	44.
46.	Memo	45.
47.	Document	46.
48.	Four page document	47.
49.	Actuator is marked with a tag	48.
50.	A wire to Jack Wilson with a tag	49.
51.	Two documents marked respectively	50.
52.	Two documents marked respectively	51.
53.	Dimension Check List	52.
54.	Set of Dimension Check Lists	53.
55.	Document	54.
56.	Tel-Hashomer Government Hospital—records of Mordechai Muscatel	unmarked
57.	Kupat Holin and Clinic—records of Mordechai Muscatel	unmarked

Exhibit Number	*Description*	*Prior Identification Number*
58.	Dr. Zwi Kahanowicz---records of Mordechai Muscatel	unmarked
59.	Tel-Hashomer Government Hospital—records of Hagai Koren	unmarked
60.	Doctors Hospital—Assif R-Saf records of Hagai Koren	unmarked
61.	Dr. Zwi Kahanowicz—records of Hagai Koren	unmarked
62.	Tel-Hashomer Government Hospital—records of Zohar Landau	unmarked
63.	Dr. Zwi Kahanowicz—records of Zohar Landau	unmarked
A.	Ministry of Transport report,	July 22, 1974 A
B.	Photocopy of document dated January 19, 1970 headed "Jet Commander Daily Inspection Sign-Off Form,"	Sept. 5. 1974 GG-1
B-1	Photocopy of document entitled "Jet Commander Daily Inspection Sign-Off Form" dated January 15, 1974,	Sept. 5, 1974 GG-3
B-2	Photocopy of document entitled "Jet Commander Daily Inspection Sign-Off Form" dated January 20, 1974,	Sept. 5, 1974 GG-3

Exhibit Number	*Description*	*Prior Identification Number*
C.	Photocopy of document dated January 2, 1970 headed "Jet Commander daily inspection check" consisting of eight pages,	Sept. 5, 1974 HH
D.	Photocopy of document entitled "Recording of flight of Jet-Commander 29 on January 21, 1970, listening test flight department IAI", consisting of 14 pages,	Sept. 5, 1974 II
E.	Flight Log of Aircraft 29, consisting of 38 pages,	Sept. 5, 1974 JJ
F.	Airworthiness approval tag signed by DMIR,	August 7, 1974 W
G-1, G-2 G-3 and G-4	Four page document, copy of shipping order 639 marked respectively,	August 7, 1974 W-1, W-2, W-3 and W-4
H.	Copy of document,	August 7, 1974 X
I.	Document,	August 7, 1974 Y
J.	Copy of letter from the Civil Aviation Authority,	August 7, 1974 Z
K.	Letter to Mr. Sutton from Mr. Jacobi,	August 7, 1974 AA
L.	Document containing inspection tags	August 7, 1974 BB

Exhibit Number	*Description*	*Prior Identification Number*
M-1, M-2	Two-part document, one being the original in Hebrew and the other the translation,	July 30, 1974 T-1, T-2
N.	Document,	July 30, 1974 U
O.	Drawing,	July 30, 1974 V
P.	Drawing,	July 30, 1974 W
Q-1 through Q-5	Group of five documents	July 30, 1974 O-1 through O-5
R-1 and R-2	Letter dated May 19, 1969 and a document with the heading "Standard Precision," dated May 20, 1969,	July 30, 1974 P-1 and P-2
S.	Document,	July 30, 1974 Q
T.	Diagram,	July 30, 1974 R
U.	Document,	July 30, 1974 S
V.	IAI Wing flap actuator specification	unmarked
Photographs of Dr. Cina	unmarked	W-8 W-1 through

Exhibit Number	*Description*	*Prior Identification Number*
X.	Purchase order for aircraft 29	unmarked
Y.	Contract of sale of 12 shipsets	unmarked
Z.	Letter, Jacobi to Miller, dated 5/6/69	unmarked
AA	Contract between IAI and NAR dated September 11, 1967	unmarked

III. The following is a list of witnesses the parties expect to call at the trial of this action. In the event any party hereafter decides to call additional witnesses, prompt notice of their identity shall be given to the other parties and to the Court, by serving and filing a Supplemental Pre-Trial Order. The Supplemental Pre-Trial Order may be in a short statement filed with the Clerk of the Court, unless served at trial, in which case it may be filed with the Honorable Robert L. Carter. It shall set forth the reasons why the witnesses were not heretofore identified. No witnesses may be called unless identified in this Pre-Trial Order or in a Supplemental Pre-Trial Order.

WITNESSES

Plaintiffs expect to call the following witnesses:

1. Zohar Landau—

   Testimony relating to his personal injuries and his knowledge of the facts and circumstances surrounding the accident.

2. Nira Landau—

   Testimony relating to the injuries of Zohar Landau.

3. Mordechai Muscatel—

   Testimony relating to his personal injuries and his knowledge of the facts and circumstances surrounding the accident.

4. Zila Muscatel—

   Testimony relating to the injuries of Mordechai Muscatel.

5. Hagai Koren—

   Testimony relating to his personal injuries and his knowledge of the facts and circumstances surrounding the accident.

6. Dalia Koren—

   Testimony relating to the injuries of Hagai Koren.

7. Leon Jacobi—

   Testimony relating to the development of the 1123 model aircraft.

8. Moise Blumkin—

   Testimony relating to mechanical design aspects of the wing flap system.

9. Reginald Sutton—

   Testimony relating to the quality control and type certification of aircraft 029.

10. Dr. Baruch Cina—

    Testimony relating to post-accident metallurgical examination of the wing flap system.

11. Myriam Rosen—

    Testimony relating to analysis of stresses acting upon the wing flap of aircraft 029.

12. Mr. Gilboa—

    Testimony relating to inspection of aircraft 029 prior to its final flight.

13. Shmuel Barak—

    Testimony relating to Israel Civil Aviation Administration post-accident investigation.

14. Lyle Jacobs—

    Testimony relating to post-accident metallurgical examination of the wing flap system.

15. Dr. Bokuvsky—

    Medical testimony as to injuries of plaintiffs.

16. Dr. Zwi Kahanowicz—

    Medical testimony relating to injuries of plaintiffs.

Defendants expect to call the following witnesses:

1. Jack Wilson—

   Development of the Standard Precision 1122 actuator.

2. Bill Diepenbrock—

   NAR's role in the development of the 1122 actuator.

3. Richard Christian—

   NAR's role in development and testing of Jet Commander model 1122.

4. Robert Carder—

   NAR's role in development and testing model 1122.

5. Dale Miller—

   Flight testing aircraft 29 in the 1122 configuration.

6. Dr. Brosnan—

   Physical examinations of Landau and Muscatel.

7. Dr. Rosenberg—

   Physical examination of Koren.

8. Carl Keller—

   Flight testing of aircraft 29 and 107 in the 1122 configuration.

9. Aubry Verser—

   Flight testing of aircraft 29 and 107 in the 1122 configuration.

10. Jack Searl—

    Test pilot for aircraft 29 will explain his duties and observations.

11. Berl Whitford—

    NAR's development of model 1122 and role of the FAA.

12. Alan Tetelman—

Metallurgist who examined failed components and will render an opinion.

13. Bernard Ross—

Aeronautical engineer who examined failed components and will render an opinion.

14. Arnold Robinson—

Aeronautical engineer who will render an opinion as to the cause of failure of the flap system.

IV. Plaintiffs estimate that they will require one week to present their case.
Defendants estimate that they will require one week to present their case.

Dated: New York, New York
December 31, 1974

So Ordered:

.....

U. S. D. J.

Consented to:

Condon & Forsyth

By /s/ William L. Schierberl
Attorneys for Plaintiff
Israel Aircraft Industries, Ltd.

Pre-Trial Order

FUCHSBERG & FUCHSBERG

By /s/ .....
Attorneys for Zohar Landau, Mordechai Muscatel, Hagai Koren, Nira Landau, Zila Muscatel, and Dalia Koren

MENDES & MOUNT

By /s/ DENNIS C. MURPHY
Attorney for Defendants

Defendants' Notice of Motion to Compel Production of Parts for Re-Examination

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE that upon the annexed affidavit of Dennis C. Murphy, sworn to this 28th day of October 1975, and upon the pleadings and prior proceedings had herein, defendants will move this court at the United States Courthouse, Foley Square, New York, New York, room 2903 on the 7th day of November 1975, at 10 o'clock in the forenoon of that date or as soon thereafter as counsel may be heard for an order pursuant to Rule 34(a) of the Federal Rules of Civil Procedure for the production of wing flap actuators for reexamination, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
October 28, 1975

Yours, etc.
MENDES & MOUNT
Attorneys for Defendants

By /s/ ERNEST D. KENNEDY
ERNEST D. KENNEDY
A member of the Firm
27 William Street
New York, New York 10005
(212) 344-7100

Affidavit of Dennis C. Murphy in Support of Foregoing Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

DENNIS C. MURPHY, being duly sworn, desposes and says that I am an attorney associated with the firm of Mendes & Mount, attorneys for the defendants, and am fully familiar with the facts of this action.

This affidavit is submitted in support of defendants' motion to produce flap actuators for reexamination pursuant to FRCP Rule 34(a).

The Plaintiff Israel Aircraft Industries is suing for breach of warranty and negligence to recover the value of an aircraft purchased from North American Rockwell, which crashed in Israel. Three crew members are suing to recover for personal injuries sustained as a result of that crash. Their wives are suing for loss of services.

The Plaintiffs commenced this law suit in January, 1973.

In July 1974, defendants' metallurgist, pursuant to a notice to produce, received from plaintiffs' attorneys four flap actuators and other components of the flap actuators of the wing flap system that had been recovered from the wreckage of the subject aircraft. The flap actuators and components had been thoroughly examined and tested by plaintiffs' metallurgist prior to delivery to defendants.

Affidavit of Dennis C. Murphy in Support of Foregoing Motion

The flap actuators were returned at the request of plaintiffs' attorneys prior to the completion of the depositions of plaintiffs and prior to submission of the pre-trial order listing plaintiffs' contentions.

Some of plaintiffs specific contentions set forth in the pre-trial order are as follows:

a. Defendants negligently designed, manufactured, tested and inspected the wing flap system and sold it to Israel Aircraft Industries, Ltd.

b. Contrary to the original design and specifications the defendants improperly and inadequately heat treated and finished the Worm Drive of the wing flap actuators.

c. Contrary to the original design and specifications the defendants manufactured the brass nut of the wing flap actuator and tube assembly of a improper and inadequate material.

d. Contrary to the original design and specifications the housing of the wing flap actuators was modified by machining the rear portion of the housing to an inadequate thickness resulting in a weakened condition which was incapable of protecting the worm gears.

g. Defendants breached their express warranties in the materials used in the fabrication of the wing flap system were not manufactured in accordance with the appropriate plans, specifications and design and were not free from defects in materials and workmanship and were not of merchantable quality and were not fit for the particular uses and purposes for which they were designed, manufactured, tested and inspected.

Affidavit of Dennis C. Murphy in Support of Foregoing Motion

h. Defendants breached their implied warranties in that the materials used in the manufacture of the wing flap systems were not free from defects in materials, workmanship and design and were not of merchantable quality and were not fit for the particular uses and purposes for which they were designed, manufactured, tested and inspected.

i. That the defendants designed, manufactured, inspected and tested a defective product and that defect was a substantial factor in causing the injuries and damages to the plaintiffs.

At the time defendants' metallurgist examined the flap actuators, plaintiffs' precise allegations of negligence and breach of warranty were not fully known and a complete metallurgical examination was not conducted.

Defendants now request that they be allowed to reexamine said aircraft flap actuators so that they may adequately reply to plaintiffs' specific allegations of defects in the design, manufacture and testing of the flap actuators and specific actuator components.

The components requested for reexamination are readily available at the plaintiffs' attorneys' office and a representative of defendants is prepared to pick up these actuators, hand carry them to the metallurgist and return them in two weeks with the usual guarantee that the actuators will not be destroyed or damaged in any way.

Defendants have been informed by Clark McCullough, secretary to Judge Carter, that this case will probably not be reached for trial until January 1976.

Affidavit of Dennis C. Murphy in Support of Foregoing Motion

If the instant motion is granted, these flap actuators will be returned to the plaintiffs' attorneys in November 1975 and there will be no delay in the trial.

Granting the instant motion will result in no prejudice to the plaintiffs. Plaintiffs had these flap actuators in their possession from the accident in January 1970 until July 1974 when they were delivered to the defendants for a short time. On the other hand, defendants will be severely prejudiced if this motion is denied in that some of the specific allegations of plaintiffs were not known at the time defendants' metallurgist examined these components.

Prior to submitting this motion, your deponent contacted Willia[illegible] L. Schierberl, attorney for plaintiff Israel Aircraft Industries, and requested reexamination of the flap actuators; he did not reply.

Wherefore, it is respectfully requested that the instant motion for the production of the four wing flap actuators be granted with the understanding that they will not be damaged and will be returned within two weeks.

/s/ DENNIS C. MURPHY
Dennis C. Murphy

(Sworn to October 28, 1975.)

Affidavit of William L. Schierberl in Opposition to Defendants' Motion to Compel Production of Parts for Re-Examination

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WILLIAM L. SCHIERBERL, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Condon & Forsyth, attorneys for plaintiff, Israel Aircraft Industries, Ltd., and I am fully familiar with all the facts and proceedings heretofore had herein.

2. I submit this Affidavit in Opposition to defendants' motion for an order, pursuant to Rule 34(a) of the Federal Rules of Civil Procedure for the production of wing flap actuators for re-examination.

3. This action was commenced by filing of Summons and Complaint on December 21, 1972. Since that time considerable discovery was had by both sides to this litigation, including the production of the wing flap actuators which defendants again seek production of for re-examination. Between January of 1973 and September of 1974 a constant, free and open exchange of discovery was had by all parties. This included several document marking

sessions; depositions of seven of plaintiffs' witnesses who came to the United States from Israel for the sole purpose of their depositions; and several depositions of defendants' witnesses.

4. On June 28, 1974 plaintiffs delivered to defendants' experts, in Palo Alto, California, the wing flap actuators which are the subject of this Motion. Defendants' experts retained complete and exclusive control of the subject aircraft parts for more than two and one-half months of unrestricted examination until, on September 16, 1974, plaintiffs were advised by defendants' experts that the tests were completed and that the parts could be picked up on September 18, 1974.

5. At a Pre Trial Conference before this Court, on May 28, 1974, the Court ordered the completion of all discovery by July 15, 1974. In October of 1974, defendants made two motions for further discovery, requesting additional depositions and answers to interrogatories. Plaintiffs opposed said motions on the grounds that: (1) defendants had all of the discovery they were entitled to; (2) two years had elapsed for defendants to conduct their discovery; and (3) any further discovery would be prejudicial to plaintiffs and purely for the purposes of harassment and delay. Apparently, this Court agreed with plaintiffs' position and, on November 15, 1974, denied both of defendants' motions for further discovery.

6. On December 4, 1974 the Court advised all counsel that this case was on Judge Carter's 24 hour ready calendar and that a Pre Trial Order was to be submitted to the Court by December 31, 1974. Pursuant to the

Affidavit of William L. Schierberl in Opposition to Defendants' Motion to Compel Production of Parts for Re-Examination

Court's instructions, all parties agreed upon and filed a Pre Trial Order on December 31, 1974.

7. In the Affidavit of Dennis C. Murphy, dated October 28, 1975, submitted in support of this Motion, defendants' contended that, since their experts' original examination of the wing flap actuators was conducted prior to the submission of the Pre Trial Order, they were unaware of plaintiffs' specific allegations and, accordingly, a complete metallurgical examination was not conducted. This position is untenable.

Plaintiffs' allegations of negligence and breach of warranty were fully set forth in plaintiffs' Complaint and were emphasized in the course of numerous depositions. Additionally, plaintiffs went far beyond the normal bounds of discovery and provided defendants with complete experts' reports and even produced their Israeli expert for deposition in New York.

All defects of the wing flap actuators which plaintiffs alleged in the Pre Trial Order were fully considered in plaintiffs' experts' reports and were emphasized in the course of the extended depositions of both sides. If defendants were surprised by plaintiffs' contentions in the Pre Trial Order, it was only because they ignored two years of pleadings and discovery. No additional or surprise contentions were set forth in the Pre Trial Order.

Further, it should be noted that defendants waited a full 10 months after agreeing upon the Pre Trial Order before any attempt was made to contact plaintiffs to obtain the parts for re-examination.

8. In view of defendants' unrestricted possession and control of the wing flap actuators until they determined

Affidavit of William L. Schierberl in Opposition to Defendants' Motion to Compel Production of Parts for Re-Examination

their examination was completed and the fact that this action has been pending for almost three years, further discovery at this late date can only serve to prejudice plaintiffs and delay the trial of this action.

WHEREFORE, it is respectfully submitted that defendants' motion for an order pursuant to Rule 34(a) of the Federal Rules of Civil Procedure for the production of wing flap actuators for re-examination should be denied in all respects and for such other and further relief as to this Court may seem just and proper in the circumstances, including costs and disbursements of this motion.

/s/ WILLIAM L. SCHIERBERL
William L. Schierberl

(Sworn to November 7, 1975.)

Memo Endorsed by Carter, *U.S.D.J.*,
Dated November 12, 1975

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN, and DALIA KOREN v. STANDARD PRECISION, A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY, and NORTH AMERICAN ROCKWELL CORPORATION

72 Civ. 5359

ENDORSEMENT

Although I do not understand how the filing of the pre-trial order has changed the allegations in plaintiffs' complaint, or why the defendants were not fully aware of the extent of plaintiffs' claims at the time of their first examination of the wing flap actuators, it nevertheless remains that plaintiffs will in no way be prejudiced by a re-examination of these objects. Accordingly, defendants' motion, pursuant to Rule 34(a), F.R.Civ.P., for the production of wing flap actuators for re-examination, for a period of two weeks, is hereby granted.

Counsel are advised that the trial of this matter will probably commence in December. In no event, however, will the trial date be postponed as the result of this new inspection.

SO ORDERED.

Dated: New York, New York
November 12, 1975

/s/ ROBERT L. CARTER
ROBERT L. CARTER
U.S.D.J.

Defendants' Notice of Motion Pursuant to Rule 56 for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE that upon the affidavit of Dennis C. Murphy, sworn to the 23rd day of December, 1975, and upon the pleadings and proceedings heretofore had and the annexed exhibits, the undersigned will move this Court before the Honorable Judge Robert L. Carter, room 2903 of the United States Court House, Foley Square, New York, New York, at 10:00 a.m., on the 2nd day of January, 1976, or as soon thereafter as counsel may be heard, for summary judgment in favor of the Defendants, dismissing Plaintiffs' complaint, pursuant to FRCP 56, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
December 23, 1975

Yours, etc.,

MENDES & MOUNT
Attorneys for Defendants

By: /s/ ANDREW P. DACHNOWICZ
Andrew P. Dachnowicz
A Member of the Firm
27 William Street
New York, New York 10005
(212) 344-7100

Affidavit of Dennis C. Murphy in Support of Foregoing Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Dennis C. Murphy, being duly sworn, deposes and says that I am an attorney admitted to practice before this Court, and am associated with the firm of Mendes & Mount, attorneys for the Defendants and I am fully familiar with the facts and circumstances of this case.

1. This affidavit is submitted in support of the instant motion pursuant to FRCP 56 for summary judgment in favor of all Defendants dimissing the plaintiffs' complaint.

2. Jurisdiction is based on diversity of citizenship. The Plaintiffs are all residents of Israel. The Defendants are incorporated under the laws of certain states of The United States, and are doing business in New York.

3. The Plaintiff, Israel Aircraft Industries, is suing for breach of warranty and negligence to recover the value of an aircraft purchased from North American Rockwell that crashed in Israel on January 21, 1970. Three crew members are suing for breach of warranty and negligence to recover for bodily injuries sustained as a result of the crash. Their wives are suing for loss of services.

4. The Plaintiffs, with the exception of Hagai Koren and Dalia Koren, commenced this action in December, 1972.

Affidavit of Dennis C. Murphy in Support of Foregoing Motion

An amended complaint was filed with the Court in April, 1973, adding the Plaintiffs Hagai Koren and Dalia Koren.

5. The Defendants' answer to the complaint included the following affirmative defenses:

a. Expiration of the statute of limitations.

b. Failure to state a cause of action.

c. Plaintiffs' contributory negligence.

d. Misuse of the product.

e. Voluntary assumption of risk.

f. Conduct by the Plaintiffs which exposed the aircraft and crew to known dangers.

7. The Defendants interposed a counter-claim against Israel Aircraft Industries for indemnification.

8. The Defendants' motion for summary judgment, dismissing all causes of action, is based on the following:

a. The Plaintiffs' cause of action for Breach of Warranty accrued in Oklahoma because the manufacture and sale of aircraft 29 and the sale of the 12 aircraft ship sets occurred in Oklahoma. (Please refer to Point III of the Memorandum of Law.)

b. All Plaintiffs' warranty actions against Standard Precision, A Division of Electronic Communications, Inc., Electronic Communications, Inc. and The National Cash Register Co. are barred by the Oklahoma two year statute of limitations under Manufacturer's Products Liability. The above Defendants have merged into a single corporation and shall hereinafter be referred to as Standard Pre-

cision. The crash of this aircraft occurred in January, 1970, and the action was commenced in December, 1972, more than two years after the occurrence. (Please refer to Point IV of the Memorandum of Law.)

c. Warranty actions by Plaintiffs Landau, Muscatel and Koren against North American Rockwell, hereinafter referred to as Rockwell, are also barred by Oklahoma's two year statute of limitations under Manufacturer's Products Liability. (Please refer to Point V of the Memorandum of Law.)

d. The Negligence causes of action of the Plaintiffs Hagai Koren and Dalia Koren, against all Defendants, should be dismissed because these actions are time barred. Hagai and Dalia Koren were named as additional Plaintiffs in an amended complaint filed in April 1973. Their suit was filed more than three years after their cause of action accrued and it is, therefore, time barred by the New York three year statute of limitations. (Please refer to Point VI of the Memorandum of Law.)

e. The Warranty and Negligence actions of Israel Aircraft Industries against Rockwell should be dismissed, pursuant to the provisions of the contracts of sale of aircraft 29 and the 12 aircraft ship sets. The contract of sale of aircraft 29 contained a "where is/as is" provision which excluded all warranties. The contract of sale for the 12 aircraft ship sets expressly excluded all implied warranties, and the express warranties did not apply to the allegedly defective wing flap system. (Please refer to Point VIII of the Memorandum of Law.)

f. The Negligence causes of action of Israel Aircraft Industries, Landau and Muscatel against Standard Preci-

sion and the Negligence causes of action Landau, Muscatel and Koren against Rockwell should be dismissed, because the loss of aircraft 29 and the subsequent injuries of the plaintiffs were proximately caused by the Negligence of Israel Aircraft Industries in redesigning, modifying, altering converting and misusing the aircraft, including the wing flap system, in a manner never intended by Rockwell, Standard Precision or the U.S. Federal Aviation Administration. (Please refer to Point IX of the Memorandum of Law.)

WHEREFORE, it is respectfully requested that summary judgment be entered in favor of all Defendants because there are no genuine issues of material fact, and the existing issues of law must be resolved in favor of the Defendants.

/s/ DENNIS C. MURPHY
Dennis C. Murphy

(Sworn to December 23, 1975.)

Affidavit of William L. Schierberl in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Cross Motion to Strike Defendants' Defenses

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

WILLIAM L. SCHIERBERL, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Condon & Forsyth, attorneys for Plaintiff, Israel Aircraft Industries, Ltd., and I am fully familiar with all the facts and proceedings heretofore had herein.

2. I submit this Affidavit in Opposition to Defendants' Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Motion to Strike Defendants Affirmative Defenses from their Answers.

3. Defendants' Motion is defective on its face based on Defendants' failure to comply with Rule 9(g) of the Local Rules of this Court. It is respectfully submitted that this Motion should not be considered by the Court because it fails to contain a Rule 9(g) Statement which requires that a motion of this type have annexed to it a ". . . separate,

short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried."

4. This action arises out of the crash of a Jet Commander aircraft, Serial No. 029, on January 21, 1970 in Israel. The aircraft was manufactured by Defendant North American Rockwell Corporation. The crash was caused by defective wing flap actuators manufactured by Defendant Standard Precision and sold to Plaintiff Israel Aircraft Industries, Ltd. by Defendant North American Rockwell Corporation.

5. This action was commenced by filing of Summons and Complaint on December 21, 1972. Plaintiffs allege causes of action for negligence, breach of express warranty and breach of implied warranty against Defendants. Plaintiff Israel Aircraft Industries, Ltd., seeks in damages the value of aircraft 029, which was totally destroyed in the crash. The individual Plaintiffs, all crew members of the aircraft, seek damages for personal injuries sustained as a result of the crash.

6. The defective actuators were manufactured by Defendant Standard Precision in Kansas and were sold by Defendant North American Rockwell Corporation to Plaintiff Israel Aircraft Industries, Ltd. in Oklahoma. All other contacts, including the origin and destination of the final flight of the aircraft, residences of all Plaintiffs, the installation of the defective actuators upon the aircraft and all damages sustained, occurred in Israel.

Affidavit of William L. Schierberl in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Cross Motion to Strike Defendants' Defenses

7. All causes of action of Plaintiff Israel Aircraft Industries, Ltd. were timely commenced within the meaning of Section 202 of the New York Civil Practice Law and Rules since they are barred by neither the statute of limitations of New York nor the statute of limitations where the causes of action accrued, Israel.

8. Defendants' argument for the application of the law of Oklahoma is untenable in light of the decided case law and the traditional doctrines of the common law concerning choice of law. There can be no doubt that the New York choice of laws rules would result in the application of Israeli law. Inasmuch as the statute of limitations of Israel for all alleged causes of action is seven years from the date the damages are incurred, all actions have been timely commenced and none are time-barred under the appropriate statute of limitations. The Court is respectfully referred to the attached Memorandum of Law in Opposition to this Motion.

9. Further, a real conflict of laws does not exist as argued in Point III of Defendants' Memorandum of Law. Upon information and belief the statute of limitations for breach of express and implied warranties under Oklahoma law is five (5) years, Okla. Stats. Title 12A, § 2-725(1), and not two (2) years as indicated in the moving papers of Defendants. Accordingly, none of the warranty causes of action are time-barred as to any of the Plaintiffs, regardless of which law is relied upon.

Affidavit of William L. Schierberl in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Cross Motion to Strike Defendants' Defenses

10. Defendants' contention that Plaintiff Israel Aircraft Industries, Ltd.'s warranty actions should be dismissed, based upon the disclaimers in a sales agreement, is arrived at by convoluted reasoning. Initially, Defendants' state that the warranty provisions of the "12 aircraft ship sets" agreement do not apply to the defective actuators. In diametric contradiction, Defendants go on to conclude that the disclaimers in the warranty clause are a bar to Plaintiffs' action.

11. If, as Defendantes contend, the warranty provisions of the "12 aircraft ship sets" agreement do not apply to the defective actuators, a separate agreement between Israel Aircraft Industries, Ltd. and North American Rockwell Corporation, dated September 11, 1967, would be the basis for recovery against North American Rockwell Corporation. The September 11, 1967 agreement contains express warranties which are applicable to the defective actuators, but no disclaimer of liability is contained therein.

WHEREFORE, it is respectfully submitted that Defendants' Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure should be denied in all respects, pursuant to Local Rule 9(g), since it is defective on its face and even if Defendants' Motion were not defective, it should be denied on the law; and further, that the Court grant Plaintiff Israel Aircraft Industries, Ltd.'s Cross Motion to Strike Defendants' Affirmative Defenses; and, that this Court grant such other and further relief

Affidavit of William L. Schierberl in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Cross Motion to Strike Defendants' Defenses

as may appear just and proper in the circumstances, including costs and disbursements of this Motion.

Dated: New York, New York
January 2, 1976

/s/ WILLIAM L. SCHIERBERL
William L. Schierberl

(Sworn to January 2, 1976.)

NOTE: Defendant's foregoing Motion for Summary Judgment and Plaintiff Israel Aircraft Industries Ltd.'s foregoing Cross-Motion to Strike Defendants' Defenses were denied by the District Court in open court. No written opinion or order was filed.

Defendant's Notice of Motion for New Trial Pursuant to FRCP 59

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant Standard Precision by its attorneys Mendes & Mount moves this Court pursuant FRCP 59 for an order setting aside the verdict returned February 4, 1976 and granting a new trial on the issue of liability as to the plaintiffs Landau, Muscatel and Koren; defendant further moves for a new trial on the issue of damages as to all plaintiffs and for judgment notwithstanding the verdict pursuant to FRCP 50 (b) against Koren on the following grounds:

1) A new trial on the issue of liability as to plaintiffs, Landau, Muscatel and Koren because the Court precluded defendants from establishing the contributory fault of Landau, Muscatel and Koren during the liability phase of the trial and refused to charge the jury on the Israeli law of Comparative Negligence which requires that plaintiffs' contributory fault be determined and that their ultimate recovery be reduced by the percent of their contributory fault. (Section 68, Civil Wrongs Ordinance)

b) A new trial on the issue of damages as to plaintiffs, Landau, Muscatel and Koren on the ground that the jury awards of $275,000 to Landau, $135,000 to

Defendant's Notice of Motion for New Trial Pursuant to FRCP 59

Muscatel and $15,000 to Koren are grossly excessive as a matter of Israeli law.

c) A new trial on the issue of damages as to plaintiff Israel Aircraft Industries on the ground that the jury award of $860,000 is excessive and that the testimony at trial of plaintiff's expert Davis failed to support the jury award.

d) Judgment notwithstanding the verdict pursuant to FRCP 50 (b) against Koren because his action was time barred and did not relate back to the timely filing of the actions of Landau and Muscatel.

e) Or in the alternative, that plaintiff Israel Aircraft Industries agree to remit $299,000, reducing the recovery to $561,000; that plaintiff Landau agree to remit $125,000 reducing his recovery to $150,000; that plaintiff Muscatel agree to remit $85,000 reducing his recovery to $50,000.

This motion is based upon the records and proceedings in this action.

[Memorandum of Law Omitted]

Affidavit of William L. Schierberl in Opposition to Defendants' Motion for a New Trial and in Support of Plaintiff Israel Aircraft Industries, Ltd.'s Cross-Motion to Dismiss Defendants' Counterclaims

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

William L. Schierberl, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Condon & Forsyth, attorneys for plaintiff Israel Aircraft Industries, Ltd. and I am familiar with all of the facts and proceedings heretofore had herein.

2. I submit this Affidavit in Opposition to defendants' Motion for a New Trial and in support of plaintiff Israel Aircraft Industries, Ltd.'s Cross-Motion to Dismiss defendants' Counter-Claims on the grounds that the jury verdict as to the value of the lost aircraft was supported by the weight of the evidence and that the releases executed by the crew members preclude their recovery in excess of 35% of the total amount awarded by the jury at the trial of this action.

3. In their Motion for a New Trial, defendants attempt to retry the factual issues of this case, which have already

been resolved by the jury. Plaintiff Israel Aircraft Industries, Ltd. presented sufficient factual evidence to support a finding by the jury that the value of the aircraft at the time of its loss was in excess of $1,200,000. However, defendants have now developed a new "cost analysis", which conflicts with their own expert's testimony and arrive at a value of $561,000.

4. Although defendants do not question the validity of the Court's instruction with regard to determining the value of the aircraft at the time of the loss, they continue to pretend that the aircraft had a fair "market value." However, the Court properly instructed the jury as follows:

> "If you find the existence of a market price for the airplane in this case you should set that price as its value. If you find that there is no market price for the aircraft you must then determine what the fair value of the aircraft was." Trial Transcript at 2498.

Defendants further attempt to recreate the thinking and calculations of the jury, but fail to take into consideration the jury's obvious factual finding that the market value for this unique test aircraft was not an adequate measure of its fair value.

5. On the basis of releases executed by plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren, translations of which are annexed hereto as Exhibits "A", "B" and "C", respectively, the crew members are precluded

from recovering in excess of 35% of the damages awarded to them by the jury at the trial of this action. Accordingly, since the crew members have released plaintiff Israel Aircraft Industries, Ltd. and their recovery must be reduced accordingly, there is no basis for the Counter-Claims of defendants and the Counter-Claims must be dismissed.

WHEREFORE, it is respectfully submitted that defendants' Motion for a New Trial should be denied in all respects and that the Court grant plaintiff Israel Aircraft Industries, Ltd.'s Cross-Motion to dismiss defendants' Counter-Claims and that this Court grant such other and further relief as may appear just and proper in the circumstances.

Dated: New York, New York
March 26, 1976

/s/ WILLIAM L. SCHIERBERL
William L. Schierberl

(Sworn to March 26, 1976.)

Exhibit A Annexed to Foregoing Affidavit

**(Deed of Release of Zohar Landau—
Translation from Hebrew)**

DEED OF RELEASE AND FULL AND FINAL ACCORD

I, the undersigned, Zohar Landau, Identity Card No. 032055, of 12 Telalim Street, Ramat Gan, employee of the Israel Aircraft Industries Ltd., Personal Number 16242, declare herewith as follows:

Whereas In the accident which occurred on 21.1.70 of Jet Commander aircraft 4X-COJ, I was injured, damages having been caused to me and a 43 percent permanent disability was determined by the National Insurance Institute, and

Whereas I reached full and final agreement with the Israel Aircraft Industries Ltd. (hereinafter IAI) and the Ministry of Defense who, without admitting responsibility for the said accident or their obligation to do so, agreed to pay me compensation as set forth below, this being in complete, final and full satisfaction of all my claims and demands in respect of everything resulting from the said accident, excluding the disability pension payable to me by the National Insurance Institute (hereinafter the Disability Pension).

Now, therefore, I hereby confirm, declare and undertake as follows:

1. I have received from IAI the amount of IL. 75,000 (Seventy Five Thousand) in complete final and full settlement of all my claims and demands against IAI and/or the Ministry of Defense, in respect of everything, directly or indirectly, connected with or

resulting from the accident of the above mentioned aircraft accident (excluding the disability pension of the National Insurance Institute).

2. The amount specified above includes full, final and complete satisfaction of all damages and/or losses of any kind or nature which have been caused to me and/or may be caused to me at any time, both directly and indirectly, as a result of the above said accident.

3. In consideration of the receipt of the amount, I herewith waive all my claims and demands and contentions, including waiver of any insurance monies which might be payable to IAI and/or the Ministry of Defense under any policy of insurance or agreement of insurance, in respect of my above mentioned injury and disability, in connection with the damages and/or losses resulting from the said accident and I hereby release IAI and/or the Ministry of Defense and/or anyone of them and/or any other person or legal body in their name and/or in their stead, from any responsibility and/or liability whatsoever in connection with the said accident.

4. I hereby declare and confirm that: neither I nor any person and/or any legal entity in my name and/or in my stead, have and will have, any demands, contentions or claims against IAI and/or the Ministry of Defense and/or any one of them and/or any other person, and/or legal entity in their name and/or in their stead, in respect of the said accident and/or everything connected therewith, and/or resulting therefrom, directly or indirectly including claims under the Law Amending the Civil Torts

Exhibit A—Deed of Release of Zohar Landau

Law (Reparation for Bodily Damages) 1964, and I undertake to indemnify the recipient of the claim or demand, should a claim be made against him by any person or body for any payment borne by him due to the above accident, up to the amount of IL. 75,000.

5. I confirm and agree that on payment of the amount, no obligation is or will be imposed on IAI to employ me in the future as a pilot, but as an engineer under the terms customary with the IAI in respect of engineers, and that to the extent that IAI will be interested at any time thereafter to employ me as a pilot, and I will be interested therein, the conditions of my employment shall be negotiated and agreed upon separately, taking into account the fact that compensation was paid to me under this deed.

6. It is known to me that IAI agreed to pay to me the amount of IL. 75,000 (Seventy Five Thousand) only based upon my above confirmation and statement.

In witness thereof I put my hand and signature

(—) Zohar Landau

Date: 20.1.71 (—) illegible

I, the undersigned *Pinhas Ben Zvi* Advocate of IAI, hereby confirm that the above Deed of Release was signed by Mr. Zohar Landau, holder of Identity Card No. 032055, on 20.1.71, after I read and thoroughly explained to him its contents and the consequences resulting therefrom.

(—) Pinhas Ben Zvi

Exhibit B Annexed to Foregoing Affidavit

(Deed of Release of Mordechai Muscatel—Translation from Hebrew)

DEED OF RELEASE AND FULL AND FINAL ACCORD

I, the undersigned, Mordechai Muscatel, holder of Identity Card No. 1042384, of Kfar Vitkin, employee of the Israel Aircraft Industries Ltd., Personal Number 11893, hereby declare as follows:

Whereas In the accident which occurred on 21.1.70 of the Jet Commander aircraft, I was injured, damages having been caused to me and a 5 percent permanent disability was determined by the National Insurance Institute, and

Whereas I reached full and final agreement with the Israel Aircraft Industries Ltd. (hereinafter IAI) and the Ministry of Defense who, without admitting responsibility for the said accident or their obligation to do so, agreed to pay me compensation as set forth below, this being in complete, final and full satisfaction of all my claims and demands in respect of everything resulting from the said accident,

Now, therefore, I hereby confirm, declare and undertake as follows:

1. I have received from IAI the amount of IL. 10,000 (Ten Thousand) in complete final and full settlement of all my claims and demands against IAI and/or the Ministry of Defense, in respect of everything, directly or indirectly, connected with or resulting from the accident of the above mentioned aircraft accident.

Exhibit B—Deed of Release of Mordechai Muscatel

2. The amount specified above includes full, final and complete satisfaction of all damages and/or losses of any kind or nature which have been caused to me and/or may be caused to me at any time, both directly and indirectly, as a result of the above said accident.

3. In consideration of the receipt of the amount, I herewith waive all my claims and demands and contentions, including waiver of any insurance monies which might be payable to IAI and/or the Ministry of Defense under any policy of insurance or agreement of insurance, in respect of my above mentioned injury and disability, in connection with the damages and/or losses resulting from the said accident and I hereby release IAI and/or the Ministry of Defense and/or anyone of them and/or any other person or legal body in their name and/or in their stead, from any responsibility and/or liability whatsoever in connection with the said accident.

4. I hereby declare and confirm that: neither I nor any person and/or any legal entity in my name and/or in my stead, have and will have any demands, contentions or claims against IAI and/or the Ministry of Defense and/or any one of them and/or any other person, and/or legal entity in their name and/or in their stead, in respect of the said accident and/or everything connected therewith, and/or resulting therefrom, directly or indirectly.

5. I hereby confirm and agree that upon payment of the amount, IAI shall not be obliged and will not be obliged to employ me as a test flight technician, and I hereby agree to work in any other job imposed

upon me under the terms customary with IAI in repect to such a job. IAI will continue to pay me each and every month, also in the future, irrespective of the job I will be employed in, a flight supplement in accordance with the grade I shall have at the time, and this as long as I will be in the employ of IAI.

6. It is further agreed that I will be allowed to be occasionally absent myself from my work without salary deduction, for the purpose of making checks and receiving treatment in connection with the accident, provided I shall submit a medical confirmation that the treatment or tests were necessary due to the accident, and provided further that I shall not be allowed to be absent more than 26 days per year.

7. It is known to me that IAI agreed to pay to me the amount of IL. 10,000 (Ten Thousand) only based upon my above confirmation and statement.

In witness thereof I put my hand and signature

Date: 1.3.71 (—) Mordechai Muscatel

I, the undersigned, *Pinhas Ben Zvi,* Advocate of IAI, hereby confirm that the above Deed of Release was signed by Mr. Mordechai Muscatel, holder of Identity Card No. 1042384, on 1.3.74, after I read and thoroughly explained to him its contents and the consequences resulting therefrom.

(—) Pinhas Ben Zvi, Adv.

Exhibit C Annexed to Foregoing Affidavit

**(Deed of Release of Hagai Koren—
Translation from Hebrew)**

DEED OF RELEASE AND FULL AND FINAL ACCORD

I, the undersigned, Hagai Koren, holder of Identity Card No. 929772, of 23 Gordon Street, Ramat Hasharon, employee of the Israel Aircraft Industries Ltd., Personal Number 13678, hereby declare as follows:

Whereas In the accident of the Jet Commander aircraft 4X-COJ which occurred on 21.1.70, I was injured and suffered damages; and

Whereas I reached full and final agreement with IAI, The State of Israel and the Ministry of Defense, for receipt of compensation as set forth below for complete, final and full satisfaction of all my claims and demands in respect of everything connected with and/or resulting from the said accident,

Now, therefore, I hereby confirm, declare and undertake as follows:

1. I have received from IAI the amount of IL. 5,000 (Five Thousand) in complete final and full settlement of all my claims and demands against IAI and/or the Ministry of Defense, and/or the State of Israel, in respect of everything, directly or indirectly, connected with or resulting from the above mentioned aircraft accident.

2. The amount specified above includes full, final and complete satisfaction of all damages and/or losses of any kind or nature which have been caused to me and/or may be caused to me at any time, both di-

rectly and indirectly, as a result of the above said accident.

3. In consideration of the receipt of the above amount I hereby waive all my claims and contentions in respect of damages resulting from the said accident and I hereby release IAI, and any other person or legal body from all liability whatsoever in connection with the said accident.

4. I hereby declare that, except myself, no other person or legal body has got any claim or demand whatsoever in respect of the said accident, and/or everything connected therewith and/or resulting therefrom, including claims under the Law Amending the Civil Tort Law (reparation of bodily damages) 1964, and I undertake to indemnify the recipient of the claim on demand, should any claim be made against him by any person or body, against any payment which will be borne by him pursuant to the said accident.

5. The above agreement was entered into by myself in view of the fact that the Medical Committee of the National Insurance Institute has found only temporary invalidity.

   Should any test to be made by the Medical Committee of the National Insurance Institute establish permanent invalidity and/or invalidity which will entail any type of surgery, I am reserving my right to apply to IAI in order to have renewed negotiations in respect of the amount of compensation.

6. It is known to me that IAI agreed to pay to me the amount of IL. 5,000 (Five Thousand) only based upon my above confirmation and statement.

Exhibit C—Deed of Release of Hagai Koren

In witness thereof I put my hand and signature:

(—) Hagai Koren

Israel Aircraft Industries, Lod Airport, 3.7.1970.

I, the undersigned, N. Sadeh, Advocate of the Legal Department of Israel Aircraft Industries, Ltd., hereby confirm that the above Deed of Release was signed on the date below by Mr. Hagai Koren, holder of Identity Card Number 929772, and this after I read and thoroughly explained to him its contents and the consequences resulting therefrom.

(—) N. Sadeh, Advocate

Memo Endorsed on Defendants' Motion for New Trial Pursuant to FRCP 59

March 29, 1976

Motion denied

So Ordered

Robert L. Carter
U S D J

Filed March 30, 1976

Notice of Motion of Plaintiff Israel Aircraft Industries, Ltd. for Summary Judgment Dismissing the Defendants' Counter-Claims

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affidavit of William L. Schierberl, sworn to on the 26th day of March 1976; upon the Post-Trial Memorandum of Law of plaintiff Israel Aircraft Industries, Ltd.; and upon all the facts and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Robert L. Carter at the United States District Court for the Southern District of New York on the 9th day of April, 1976, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure for Summary Judgment dismissing the defendants' Counter-Claims and for such other and further relief as to this Court may appear just and proper in the circumstances.

Dated: New York, New York
March 30, 1976

CONDON & FORSYTH

By /s/ WILLIAM L. SCHIERBERL
William L. Schierberl
Attorneys for Plaintiff
Israel Aircraft Industries, Ltd.
1251 Avenue of the Americas
New York, N.Y. 10020
Tele: (212) 757-6870

Defendants' Notice of Cross-Motion to Amend Answer and for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Dennis C. Murphy and Y. Beinisch and a Memorandum of Law, the defendant Standard Precision will oppose IAI's motion for Summary Judgment and cross-move this Court before the Honorable Robert L. Carter at the United States District Court for the Southern District of New York on the 23rd day of April, 1976, to amend its Answer pursuant to FRCP Rule 15(b) and for Summary Judgment pursuant to FRCP Rule 56(b) in favor of defendant Standard Precision against plaintiffs Landau, Muscatel and Koren and for such other and further relief as to this Court may appear just and proper.

Dated: New York, New York
April 19, 1976

MENDES & MOUNT

By: /s/ DENNIS C. MURPHY
DENNIS C. MURPHY
Attorneys for Defendants
27 William Street
New York, NY 10005
(212) 344-7100

Affidavit of Dennis C. Murphy in Support of Foregoing Cross-Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

Dennis C. Murphy, being duly sworn, deposes and says:

1. I am an associate of the firm of Mendes & Mount, attorneys for defendants and I am familiar with all of the facts and proceedings in this case.

2. I submit this affidavit in opposition to IAI's motion to dismiss defendants' Counter-Claims and in support of defendants' cross-motion to amend its Answer to include the Affirmative Defense of Release, and for Summary Judgment against plaintiffs Landau, Muscatel and Koren pursuant to FRCP Rule 56(b). This motion is based upon General Releases executed by plaintiffs Landau, Muscatel and Koren nearly two years prior to the commencement of this action. (Exhibits A, B & C)

3. Copies of these executed Releases (English translation) were seen for the first time by defendants on March 26, 1976 as exhibits to plaintiff IAI's Memorandum of Law in support of their motion for Summary Judgment.

Affidavit of Dennis C. Murphy in Support of Foregoing Cross-Motion

4. These executed Releases under Israeli law released all tortfeasors including Standard Precision in that they were General Releases and contained no reservation of rights. (Affidavit of Y. Beinisch, Exhibit D)

5. Defendants concur with the plaintiff IAI's Memorandum of Law Point II that the crew members' Releases under New York law released all tortfeasors including the defendants in this action.

6. During discovery proceedings, defendants endeavored to discover all records pertaining to the individual plaintiffs including executed Releases. (Exhibit E, Notice for Production of Documents). These General Releases were contained in IAI's records and were in the possession of Landau, Muscatel and Koren and thereby subject to discovery pursuant to FRCP Rule 34. The Releases were not produced until after the trial. (March 26, 1976).

7. Landau, Muscatel and Koren were fully apprised of the legal significance of the General Releases and withheld the existence of these Releases and mislead defendants during depositions.

8. IAI violated FRCP Rules 8 and 12, by failing to plead the Affirmative Defense of Release in reply to defendants' Counter-Claims. Had IAI complied with Rules 8 and 12, defendants would have moved to dismiss plaintiffs' Complaint before trial based on these General Releases.

9. Standard Precision should be allowed, pursuant to FRCP Rule 15(d), to amend its Answer to include the Affirmative Defense of Release.

Affidavit of Dennis C. Murphy in Support of Foregoing Cross-Motion

10. IAI's Summary Judgment motion to dismiss defendants' Counter-Claims should be denied. At this juncture in the proceedings, IAI should not be allowed to profit by their clear violation of FRCP Rules 8 and 12.

WHEREFORE, it is respectfully requested that IAI's motion be denied and that defendants' motion to amend its Answer and for Summary Judgment be granted in all respects.

Dated: New York, New York
April 19, 1976

/s/ DENNIS C. MURPHY
Dennis C. Murphy

(Sworn to April 20, 1976)

Exhibit A Annexed to Foregoing Affidavit

Deed of Release and Full and Final Accord of Zohar Landau—Translation from Hebrew, dated January 20, 1971—printed above at pages 186a-188a.

Exhibit B Annexed to Foregoing Affidavit

Deed of Release and Full and Final Accord of Mordechai Muscatel—Translation from Hebrew, dated March 1, 1971 —printed above at pages 189a-191a.

Exhibit C Annexed to Foregoing Affidavit

Deed of Release and Full and Final Accord of Hagai Koren—Translation from Hebrew, dated July 3, 1970—printed above at pages 192a-194a.

Exhibit D Annexed to Foregoing Affidavit

(Affidavit of Y. Beinisch)

AFFIDAVIT

I, the undersigned, Y. Beinisch, having been cautioned that the contents of this affidavit must be true and that I may be prosecuted according to law if they are not, hereby declare:—

1. I am an advocate, a member of the Israel Chamber of Advocates, a graduate of the Faculty of Law of the Hebrew University of Jerusalem and have specialized in the field of torts, I act as counsellor to Israeli and foreign insurance companies carrying on business in Israel, and appear before all courts and tribunals on insurance and tort matters.

2. I have been requested to furnish my opinion on deeds of release and full and final accord signed by the claimants Zohar Landau, Mordechai Muscatel and Hagai Koren, photostatic copies whereof are attached to this affidavit, marked "A", and which, I have been informed, came to the knowledge of the defendant after judgment had been given in the case between the claimants and the defendant.

3. The rule laid down by the Supreme Court in Israel, sitting as a court of Civil Appeals, in C.A. 125/68 is that an event occurring after judgment is given and likely to alter the rights of the parties generally provides a cause of action to apply to the court of the first instance and not to the court of appeal. The first page of the above judgment is attached hereto and marked "B".

Furthermore, the Civil Procedure Regulations, 5723-1963 (Regulation 415) and established precedents provide that the court may permit a party to lead additional evidence, upon certain conditions. In this case, the relevant condition is that the document obtained was not available to the party during the trial before the court of the first instance and that that party did not know of its existence.

Supreme Court Justice Y. Sussman restates this rule in his book, The Law of Civil Procedure, 4th edition, page 653. This work is regarded as the best and most authoritative work on civil procedure in Israel.

4. With regard to the above deeds of release and full and final accord, there is no doubt that by signing them the claimants waived all and any claims of any kind against any body for the accident on January 21, 1970, except for the benefits received and to be received from the National Insurance Instiute.

5. I have examined both the original of the deeds of release and full and final accord, signed in Hebrew, and their English translation, and it is quite clear that by signing these documents, whose contents were read and explained to the claimants by a lawyer, who also explained their significance, the claimants waived all claims against any tortfeasor, in addition to the Israel Aircraft Industries (I.A.I).

6. The above deeds also state that the payment made was made in full and final settlement of all the claimants' demands and claims arising out of the said accident and that this sum covers all the damages and losses suffered by them as a result of the accident.

7. Furthermore, the Israeli Supreme Court held in 1957, in C.A. 344/56, that the fact that an employee received compensation for damages from his employer is sufficient to bar a claim for damages from a third party. A photostatic copy of this judgment is attached hereto and marked "C".

8. In the above judgment (C.A. 344/56) it was held further that even had the employee reserved the right to claim damages from the third party, it would have been insufficient without an undertaking on his part to refund the compensation he received to his employer should he succeed in his claim against the third party, and he has to state this specifically in the deed of release and full and final accord.

   However, in the above deeds of release and full and final accord there is not even any hint of such an undertaking by the employee towards the employer who compensated him.

9. There is a clear prohibition in law (the Civil Wrongs Ordinance) in this regard, and the Supreme Court has interpreted it very strictly.

   Once a claimant has claimed from one tortfeasor and obtained any sum from one of them, the second tortfeasor is exempt (see p. 406, para. 4, of the judgment in C.A. 344/56).

   Furthermore, the Supreme Court has held, in C.A. 30/72 (a photostatic copy whereof is attached hereto and marked "E"), that in the case of joint tortfeasors, the release of the one does not involve the release of the others *if this is specifically stated,* particularly as this refers to an undertaking not to

claim from one of the tortfeasors while reserving the right to claim against the others.

For the purposes of the present case, there was no specific statement that the remaining tortfeasors were not being released and they are, accordingly, released in the same way as the Israel Aircraft Industries and the Ministry of Defense.

10. At all events, the claimant is bound to deduct from the amount of his claim the sum received from any other body for the damages suffered by him as a result of the accident.

The same rule applies to benefits received and to be received from the National Insurance Institute.

In this regard, see the judgment of the Israeli Supreme Court in C.A. 667/68, a photostatic copy whereof is attached hereto and marked "D".

11. Even in the event that the deeds of release and full and final accord did not estop the claimant from issuing summons, the claimants were bound to disclose to the defendant the existence of these deeds of release and full and final accord and the fact that they had signed such documents, and to deduct the sums received from the summons.

However, in the present case the deeds of release and full and final accord signed by the claimants undoubtedly estop them from making claims on any person or body, whether in Israel or anywhere else in the world, consequent on the accident in which they were involved on January 21, 1970.

12. In my opinion, the claimants Koren, Landau and Muscatel may not issue summons against any other

tortfeasor after receiving compensation from the Israel Aircraft Industries for damages as a result of the accident in which they were involved while in the employ of the Israel Aircraft Industries. Furthermore, it is clear from the deeds of release and full and final accord that by the payment they received, the above claimants released the Israel Aircraft Industries and any other body from liability and indebtedness to them, and it is a fact that when they wished to reserve some right, this was stated specifically, e.g., their right against the National Insurance Institute.

It is, therefore, clear that had they wished to reserve any right, the claimants would have done so.

IN WITNESS WHEREOF I have hereunto set my hand this 12 day of April, 1976.

/s/ Y. BEINISCH
Y. Beinisch

(Authenticated by Vice Consul of the United States of America on April 12, 1976)

Attachments to Exhibit D

(Affidavit of Y. Beinisch)

Untranslated copies of decisions of Israeli Courts in the Hebrew language are omitted.

[Exhibits E, F, G, H, I and J are referred to in Defendants' Memorandum of Law in Support of the foregoing Cross Motion which is not a part of this Appendix and, accordingly, are omitted.]

Affidavit of Marshall S. Turner Containing Original Releases and Translations

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MARSHALL S. TURNER, being first duly sworn, deposes and says:

1. I am a member of the bar of this Court and associated with the firm of Condon & Forsyth, attorneys for plaintiff, Israel Aircraft Industries, Ltd. I am fully familiar with all of the facts and proceedings heretofore had herein.

2. I submit this affidavit and the annexed exhibits at the request of Mr. Thomas Kline, a law clerk of The Honorable Robert L. Carter.

3. When Mr. Kline requested that I provide him with the original "Deeds of Release and Full and Final Accords", which were signed and executed by plaintiffs, Zohar Landau, Mordechai Muscatel and Hagai Koren, I immediately contacted my client and requested that the Deeds of Release be forwarded by air mail.

4. On September 28, 1976, I received the Releases, which are annexed hereto as Exhibits "A", "B" and "C".

5. I have been advised by my client that the Exhibits "A", "B" and "C" are the originals of the executed Deeds of Release, which were signed by the plaintiffs, Zohar

Affidavit of Marshall S. Turner Containing Original Releases and Translations

Landau, Mordechai Muscatel and Hagai Koren on January 20, 1971, March 1, 1971 and July 3, 1970 respectively. The signatures of plaintiffs, Zohar Landau and Mordechai Muscatel, were witnessed by Mr. Pinhas Ben Zvi, attorney at law. The signature of plaintiff Hagai Koren was witnessed by N. Sadeh, attorney at law.

6. I have been advised by my client that Exhibits "D", "E" and "F" annexed hereto are true and accurate translations of Exhibits "A", "B" and "C" and are copies of the translations which were annexed to plaintiff, Israel Aircraft Industries, Ltd.'s, "Affidavit in Opposition to Defendants' Motion for a New Trial and in Support of Plaintiff, Israel Aircraft Industries, Ltd.'s Cross-Motion to Dismiss Defendants' Counter-Claim" which was sworn to on the 26th day of March, 1976.

7. Upon information and belief, the truth and accuracy of the translations has never been disputed by plaintiffs, Zohar Landau, Mordechai Muscatel and Hagai Koren.

Dated: New York, New York
September 29, 1976

Respectfully submitted,

/s/ MARSHALL S. TURNER
Marshall S. Turner
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York, 10020
Tele: (212) 757-6870
Attorneys for Plaintiff
ISRAEL AIRCRAFT INDUSTRIES, LTD.

(Sworn to September 29, 1976.)

Exhibits A-C Annexed to Foregoing Affidavit

Original Deeds of Release and Full and First Accord of Zohar Landau, Mordechai Muscatel and Hagai Koren, dated January 20, 1971, March 1, 1971 and July 3, 1970 respectively in the Hebrew language are omitted.

Exhibits D-F Annexed to Foregoing Affidavit

English translations of Deeds of Release and Full and Final Accord of Zohar Landau, Mordechai Muscatel and Hagai Koren dated January 20, 1971, March 1, 1971 and July 3, 1970, respectively are printed above at pages 186a-194a.

Opinion and Order of the District Court, dated October 26, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ISRAEL AIRCRAFT INDUSTRIES, et al.,

Plaintiffs,

—against—

STANDARD PRECISION, et al.,

Defendants.

APPEARANCES:

CONDON & FORSYTH, Esqs.
1251 Avenue of the Americas
New York, New York 10020
by William L. Shierberl, Esq. and
Marshal Turner, Esq.
Attorneys for Plaintiff IAI

FUCHSBERG & FUCHSBERG, Esqs.
250 Broadway
New York, New York 10007
by Norman Cousins, Esq.
Attorneys for Plaintiffs Zohar Landau, Mordechai Muscatel, and Hagai Koren

MENDES & MOUNT, Esqs.
27 William Street
New York, New York 10005
by Dennis Murphy, Esq. and
Barry Wetherington, Esq.
Attorneys for Defendants

CARTER, *District Judge:*

Opinion and Order of the District Court, dated October 26, 1976

Opinion

I

The Jury Verdict

This is an action for personal injuries and property damage sustained as the result of the crash of a jet airplane in Israel on January 21, 1970. Plaintiffs are Israel Aircraft Industries, Ltd., ("IAI") the owner of the aircraft, and the three crew members, Zohar Landau, Mordechai Muscatel, and Hagai Koren, ("Landau", "Muscatel" and "Koren") all of whom were injured when they bailed out of the jet.[1] Defendants are North American Rockwell Corporation ("Rockwell"), maker of the aircraft, and Standard Precision, a Division of Electronic Communications, Inc. ("SP"), manufacturer of the wing flap actuator, the part alleged to have failed causing the crash.

The complaint encompassed causes of action for negligence, breach of warranty, and strict products liability.[2] The defendants counterclaimed against IAI on the ground that modifications by IAI to the wing flap actuator caused the crash.

---

[1] The wives of the three crew members originally were plaintiffs in the action, suing for loss of services incident to the injuries suffered by their husbands. When the court ruled at trial that Israeli law would apply to loss of service claims, these actions were dismissed because Israel does not recognize such a cause of action.

[2] Initially the action was brought on behalf of all plaintiffs except the Korens. An amended complaint was subsequently filed on behalf of all plaintiffs. Both complaints were signed by William L. Schierberl of the law firm Condon & Forsyth. Norman Leonard Cousins of Fuchsberg & Fuchsberg later took over the representation of the individual plaintiffs. Exactly when this change took place is not clear since Cousins never filed a motion to be substituted as counsel of record. Both defendants have been represented throughout by Dennis Murphy of Mendes & Mount.

Opinion and Order of the District Court, dated October 26, 1976

After trial the jury prorated 65% of the responsibility for the crash against IAI, 35% against SP, and none against Rockwell. The jury also held Rockwell not liable to IAI for breach of warranty. It assessed total damages for the value of the lost aircraft at $860,000. SP's liability to IAI for damage to the lost aircraft was thus held to be $301,000. The jury also awarded damages to crew members for their injuries as follows: Landau—$275,000, Muscatel—$135,000, and Koren—$15,000. Because liability had been established at 65% IAI and 35% SP, when SP paid the crew members $425,000, the total amount assessed, it could then recover 65% of that amount, or $276,250, from IAI.

Post Trial Motions By IAI

IAI has now moved, pursuant to Rule 56(b), F.R.Civ.P., for judgment against SP on SP's counterclaim on the ground that long before trial IAI had compensated Landau, Muscatel, and Koren for their injuries in exchange for the execution of a release from liability by each crew member. IAI asserts that these payments, 75,000 Israeli pounds (IL) to Landau, IL 10,000 to Muscatel, and IL 5,000 to Koren, made in exchange for the releases, satisfy in full its liability to the crew members either directly or indirectly. If the crew members are allowed to recover the full amount of their jury verdict from SP, says IAI, they will be paid twice for the portion of their injuries found by the jury to have been caused by IAI, and if IAI must reimburse SP for 65% of the total damages awarded to the crew members, then IAI will be paying twice for its responsibility for injuries to the crew.

Opinion and Order of the District Court, dated October 26, 1976

IAI argues that in the face of these releases, the crew members can seek recovery only for the equitable share of the injuries not attributable to IAI's actions. IAI asks, therefore, that the jury verdict in favor of the plaintiff crew members be reduced 65% and the counterclaim by SP be dismissed. IAI asks that its delay in asserting the defense of release be excused because attorneys representing it in this action did not previously understand the nature of the releases.[3]

The releases presented to the court are entitled "Deed of Release and Full and Final Accord." The one signed by Landau is dated January 20, 1971; Muscatel's is dated March 1, 1971; and Koren's July 3, 1970. Each recites that the party signing it has received a sum of money "in complete final and full settlement of all my claims and demands against IAI and/or the Ministry of Defense in respect of everything, directly or indirectly, connected with or resulting from the accident. . . ." [4] and that the money received "includes full, final and complete satisfaction of all damages and/or losses of any kind or nature which have been caused to me and/or may be caused to me at any time, both directly and indirectly, as a result of the said accident." The releases recite further that in consideration of the funds received, the crew members waive

---

[3] "The only reason the Releases were not raised earlier was that U.S. counsel for Israel Aircraft Industries, Ltd. and, apparently, counsel for the crew members as well as defense counsel were unaware of the fundamental difference between the law of Israel and the law of New York, which permits direct actions by employees against their employers." (Reply Memorandum of IAI, at pp. 8-9)

[4] The releases vary slightly in ways not material to the disposition of these motions. In this instance, Koren's release mentions the State of Israel as an additional party released.

and release all claims against IAI and the Ministry of Defense.[5]

The releases conclude:

> "6. It is known to me that IAI agreed to pay to me the amount of IL [with the appropriate amount recited] only based upon my above confirmation and statement." [6]

Below the signature of each plaintiff crew member is a signed statement by an attorney for IAI stating that he "read and thoroughly explained" the contents of the release to the person who signed it.

Post Trial Motions By SP

SP has cross-moved to amend its answer pursuant to Rule 15(d), F.R.Civ.P., to assert the defense of release and for judgment against plaintiff crew members. According to SP, under Israeli law at the time the releases were signed, the release of one tortfeasor by an injured party

---

[5] Paragraph 3 of Landau and Muscatel's release reads as follows:

> "3. In consideration of the receipt of the amount, I herewith waive all my claims and demands and contentions, including waiver of any insurance monies which might be payable to IAI and/or the Ministry of Defense under any policy of insurance or agreement of insurance, in respect of my above mentioned injury and disability, in connection with the damages and/or losses resulting from the said accident and I hereby release IAI and/or the Ministry of Defense and/or anyone of them and/or any other person or legal body in their name and/or in their stead, from any responsibility and/or liability whatsoever in connection with the said accident."

Again, in ways not relevant here, the language in the release signed by Koren varies somewhat from the language quoted above.

[6] The appropriate amounts are: Landau—IL 75,000; Muscatel—IL 10,000; and Koren—IL 5,000.

released all tortfeasors.[7] SP argues that it should be allowed to amend its answer even after trial and a jury verdict because during pre-trial discovery IAI and the crew members failed to disclose the releases, despite SP's reasonable attempts to ascertain their existence. Moreover, SP contends there was no valid excuse for IAI's delay in asserting, as an affirmative defense to SP's counterclaim, that the crew members had released it from liability. Further, SP characterizes the failure to disclose and the concealment of the releases as a fraud upon the court necessitating judgment for SP against IAI and the crew members.

SP details various steps taken to discover all the facts relating to the relevant issues in this lawsuit. A notice for production of documents, served on plaintiffs on behalf of defendants included the following request:

> "11. All personnel records of the individual plaintiffs which are in the possession or control of ISRAEL AIRCRAFT INDUSTRIES, LTD., including but not limited to payroll, medical, hiring, training and work of the individual plaintiffs as employees of said ISRAEL AIRCRAFT INDUSTRIES, Ltd."

At a meeting between the attorneys for defendants and for IAI, the following interchange occurred:

> "MR. FITZSIMONS [for the defendants]: Do you have anything at all to produce with respect to item No. 11 calling for the personnel records of the individual plaintiffs?"
>
> "MR. SCHIERBERL [for plaintiffs]: Not at this time. We are obtaining those records and as soon as we have

[7] At present under Israeli law a release of one tortfeasor will not release all tortfeasors if the intention to pursue claims against the others is expressly stated in the release.

them I will give them to you" Transcript of Meeting of January 10, 1974, at pp. 120-121.

In spite of the request and the assurance, the releases were not included in the materials turned over to defendants.

During the deposition of plaintiff Muscatel, the following discussion took place:

"Q. Can you tell us what the 10,000 pounds lump sum payment you received from IAI represented?
A. I think there was an agreement between me and I.A.I. to get that sum of money because of what happened to me.

Q. Does the sum of money have some relationship to—let me withdraw that. Was this money paid to you as a result of your injuries sustained in this accident?
A. Yes.

Q. Pursuant to the agreement between yourself and I.A.I., this money must be repaid to them out of any you might get as a result of this lawsuit?
A. Yes."

Deposition of Muscatel, July 24, 1974 at p. 40.

SP argues that the answer to the last question was false and misleading. The releases contain no language requiring repayment. SP maintains that the statement that the money was paid pursuant to such an agreement, lead it to believe that the payments were in the nature of workman's compensation, which would not require a release and which would not bar or limit an action against a party other than the employer.[8]

---

[8] IAI and SP make reference to additional agreements between IAI and the crew members, to which Muscatel may have been re-

Opinion and Order of the District Court, dated October 26, 1976

While the crew members and IAI were still represented by Condon & Forsyth, the following interrogatories were asked by SP relating to crew members Muscatel and Landau:

"12. Details of any injury payments made by IAI.

13. Whether or not any of the above-mentioned payments are taken into account and deducted from damages under Israeli law."

(Israel Aircraft Industries, Limited, Re: Accident to Jet Commander 029 on January 29, 1970. List of questions relating to Mr. Zohar Landau and Mr. Mordechai Muscatel, 13th September, 1972.)

Muscatel responded:

"12. Payment made by IAI IL 10,000.

13. . . . [P]ayment per para. 12 is not a question of law since it was an ex gratia grant; it was now agreed that in case Mr. Muscatel's action is successful, he will refund this grant out of the proceeds."

---

ferring here. Under these alleged agreements, IAI would finance this lawsuit on behalf of itself and the crew members, subject to reimbursement of its expenses and of the original payments to the crew members if the action proved successful. Yet, even if Muscatel was confused about which agreement he was being questioned, which has not been contended, no step was ever taken to correct the false and misleading impression given to the defendants in his deposition of July 24, 1974.

It should be noted that these agreements have not been submitted to the court and are not referred to by any sworn affidavits. They are, however, referred to by Dr. David Hermann, retained by IAI as counsel, in his unsworn affidavit, at p. 4. IAI having submitted this affidavit, it can make no complaint if the court considers it in rendering this opinion.

Opinion and Order of the District Court, dated October 26, 1976

(Re: Accident to Jet Commander 029 on 21.1.1970, Mordechai Muscatel at p. 1.)

Landau's answer was:

"12. Injury payment and reparation for loss of future income of the amount of IL 75,000 were made by IAI.

13. . . . The payment made by IAI is not subject to law as it was an ex gratia payment; it was agreed that in case the present action succeeds, it will be refunded to IAI out of the proceeds."

(Re: Accident to Jet Commander 029 on 21.1.70, Zohar Landau, at p. 1.)

SP argues that the releases show that the payments were not ex gratia or gratuitous. Rather, says SP, the money was given for full consideration, *i.e.*, the execution of deeds of release.

Counsel for the crew members argues that IAI should be estopped from asserting the defense of release at this time. He now argues that the releases be declared invalid for a variety of reasons. For example, counsel states the agreements were contracts of adhesion, and that they were drawn in a manner that does not reflect the parties' true desires.[9]

---

[9] At various points in the memoranda submitted to the court by Cousins on behalf of Koren, it is stated that this crew member denies signing a release. (Memorandum, pp. 25, 30, 31.) At other points in the memoranda, it is admitted that Koren signed such a release. (Memorandum at pp. 23, 33; Supplemental Memorandum at pp. 3, 6.) No sworn affidavit, however, was submitted by Koren denying that he has signed a release. Nor has counsel even submitted his own sworn statement clearly setting forth Koren's position. Since the signed original of the release is now part of the record, the court takes Koren's failure to submit an affidavit giving his version of the facts to constitute an admission that he signed the release as submitted. *See* Rule 56(e) F.R.Civ.P.

Opinion and Order of the District Court, dated October 26, 1976

II

Plaintiffs Cannot Now Profit From Disclosure of the Releases

The defenses that counsel seeks to assert on behalf of the crew members must be based on a factual predicate not present in this case. This court cannot conclude, absent sworn affidavits from counsel or from the plaintiffs themselves that, for example, any crew member was pressured into signing the release or that he did not understand the import of its terms. Were it necessary to determine the validity of the releases, the court would have received no help from plaintiff crew members by way of factual elaboration. The court does not, however, need to reach the validity of these releases in disposing of these motions. Their validity has not been factually controverted, and the releases have been kept secret too long by plaintiff crew members and by IAI to allow the parties secreting the releases to put their validity in issue at this juncture of the litigation.

Plaintiff crew members chose to bring this suit without mentioning the releases, and without asking the court to determine their rights under these agreements. They followed this theory through three years of litigation and nearly five weeks of trial before a jury. It is now too late in the day to alter their theory of the case. Had the releases been disclosed in a timely way, it would have been incumbent upon the court to determine their validity and effect under Israeli law. Indeed, it is possible that the time spent on this case would have been drastically reduced had the existence of the releases been known. Certainly the jury verdict would have been affected by knowledge that IAI had been given full release by the crew members in consideration for payment of a sum of money. In

N.A.A.C.P. v. *Alabama,* 360 U.S. 240, 243 (1959), the United States Supreme Court rejected Alabama's attempt to restructure its argument after a lengthy period of litigation had already ensued, stating:

> "[The State] now for the first time here says that it 'has never agreed, and does not now agree, that the petitioner has complied with the trial court's order to produce with the exception of membership. The respondent, in fact, specifically denies that the petitioner has produced or offered to produce in all respects except for membership.' This denial comes too late. The State is bound by its previously taken position. . . ."

Similarly, it is now too late in this case for the crew members to argue for the first time that the releases are invalid, that they only release IAI, or that they were not signed voluntarily.

It is also too late for IAI to unearth the releases as a basis for dismissal of SP's counterclaim. IAI's lame excuse that its attorneys in New York did not understand the meaning of instructions drawn by its attorneys in Israel cannot justify its failure to disclose the releases as affirmative defense to SP's counterclaim. Even had a different conclusion been reached in respect to the crew members' claims, IAI would nevertheless be barred from using the release as a defense at this time. *See* Rules 8 and 12, F.R.Civ.P.

Rule 37 Warrants Dismissal of Plaintiffs' Claims

The releases should have been produced by IAI in response to SP's request to produce number 11. Additionally, Muscatel's deposition answers betray a lack of candor that cannot be tolerated of a litigant. The same is true of

Muscatel's and Landau's answers to defendants' interrogatories, noted above. Since the answers of Muscatel and Landau to questions were evasive or incorrect, each response may be treated as a failure to answer. Rule 37(a)(3), F.R.Civ.P. The court has the power to dismiss all claims solely on the ground of failure to make proper responses to defendants' pre-trial discovery efforts. Rule 37(b)(2)(C), F.R.Civ.P.

Ordinarily, sanctions for failure of a party to respond to an opponent's discovery requests are not appropriate absent an existing court order to provide or permit discovery which has been disobeyed. Rule 37(b)(2)(C); *See United States* v. *Mensik*, 381 F. Supp. 672, 680 (N.D. Ill. 1974); 8 Wright and Miller, *Federal Practice Procedure*, § 2284, at p. 764. Yet, the protections and sanctions in the Federal Rules are not absolute and contemplate the use of judicial discretion in fashioning a broad range of remedies and procedures by which compliance with the discovery rules may be enforced. *Marshall* v. *Ford Motor Co.*, 446 F. 2d 712 (10th Cir. 1971); *B.F. Goodrich Tire Co.* v. *Lyster*, 328 F.2d 411 (5th Cir. 1964); Wright and Miller, *Ibid.* The facts of this case warrant the exercise of such discretion and a deviation from the general interpretation of Rule 37.

Defendants had no way of knowing what information and documents were being withheld, and thus could not have made the appropriate Rule 37 motion normally a prerequisite to court sanction under that rule. Moreover, to a large degree it was the misleading and inaccurate statements by plaintiffs that kept defendants from making any such motion. The sanctions under Rule 37 were provided to prevent just the sort of developments in litigation that occurred here. Under these circumstances, sanctions

against plaintiffs are appropriate even though there has been no violation of a specific court order to disclose particular information.

Fraud was Perpetrated on the Court Necessitating Sanctions Against Plaintiffs Under Rule 60(b)

Rule 60(b) empowers federal courts to "relieve a party . . . from a final judgment, order, or proceeding for the following reasons; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), ..." Although defendant SP has raised the issue of fraud on the court, it has not gone so far as to move under Rule 60(b)(3), F.R.Civ. P., to dismiss all claims of both plaintiffs on that basis. Nevertheless, the court on its own motion may take such action as is necessary in response to fraud of a serious dimension. *Universal Oil Products Co.* v. *Root Ref. Co.*, 328 U.S. 575 (1946); *Martina Theatre Corp.* v. *Schine Chain Theatres, Inc.*, 278 F. 2d 798 at 801 (2d Cir. 1960). When fraud has been committed on the court there is an injury to the public and to public institutions. The court has the right and the duty to protect itself and to right the wrong, and is not dependent on the actions of the parties to seek redress for the fraud. As the Supreme Court stated in *Hazel-Atlas Glass Company* v. *Hartford-Empire Co.*, 322 U.S. 238, 246 (1944):

> "[T]ampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process

> must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

Our circuit has held that fraud on the court is "that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Kupferman* v. *Consolidated Research and Manufacturing Corp.*, 459 F. 2d 1072, 1078 (2d Cir. 1972), quoting, 7 Moore, *Federal Practice* ¶ 60.33 at p. 515 (1971 ed.) (footnote omitted). *See also, Serzysko* v. *Chase Manhattan Bank*, 461 F. 2d 699, (2d Cir.), *cert. denied*, 49 409 U.S. 883 (1972); *Martina Theatre Corp.* v. *Schine Chain Theatres, Inc., supra.* While in *Kupferman* the Court of Appeals declined to find such fraud as would mandate vacating the earlier judgment in that litigation, it did so primarily because

> "it would be going too far to characterize as 'fraud on the court' [defendant's] failure to disclose an instrument [defendant] could have supposed reasonably—although as it now appears, erroneously—to have been known to his adversary." *Kupferman, supra,* at 1081.

There can be no doubt that in this case, however, plaintiffs knowingly and fraudulently withheld from defendants, the court and the jury, matters material to the fair disposition of claims presented in this lawsuit which were known by no one but themselves. This constituted a serious interference with the judicial process and dismissal of all

claims of the plaintiffs seems the only appropriate course the court can take.

In the first instance, the complaints of the crew members signed by attorney William L. Schierberl make no reference to any releases, and demand recovery for each crew member without mention of money accepted in partial settlement. Having settled at least a portion of their claims for damages, the crew members could not expect to come in to court and ask to be compensated in full for these same injuries. It is outrageous that they did so. The crew members are educated, intelligent men. Two hold engineering degrees from American Universities. They were well aware that they signed releases and that a lawsuit demanding full compensation was being started in their names. Additionally, and perhaps more importantly in light of this circuit's holdings, the attorney who signed the pleadings on behalf of the plaintiff crew members was in a position to know what he was doing. Cousins, the attorney who replaced Schierberl as counsel for the crew members, admits in an unsworn statement that one of his clients informed him of the releases before the termination of the jury trial (Memorandum at p. 7.) Yet he took no positive step to bring these releases to the attention of the court and mentioned them only in response to the instant motions. It is thus clear that Cousins withheld material information from the court.[10] In responding to IAI's post-trial motion for summary judgment, Cousins argues at one point: "If the documents signed by the crew members were general releases, then Israel Aircraft is charged with knowing that

---

[10] Even now, with his clients' claims resting in the balance, Cousins continues to obfuscate the issues by failing to submit a single sworn affidavit from himself or any of his clients setting out the facts of these transactions in a way that might invite the court to draw some conclusion more favorable to the crew members.

and perpetrating a fraud upon the court, the defendants and their own employees." (Memorandum at p. 4.) The court agrees with this statement as regards the actions of IAI, but it also finds that the crew members were equally guilty in not disclosing the releases.

Although IAI's failure to assert the releases in its reply to defendants' counterclaim is not by itself a fraud on the court, when viewed together with other actions taken by IAI that omission becomes part of a clear pattern of deception. It is apparent that IAI withheld the information that the crew members had signed releases in the hope that the crew members might be awarded a large verdict from which IAI could recover the amounts it had paid the crew members pursuant to the releases. Indeed, the releases would never have been disclosed but for the fact that IAI was found largely responsible for the crash and the crew members' injuries. Thus it found itself faced with potential liability of $276,250 for its share of injuries to the crew members and being required to make two payments to crew members. Only because the jury returned a verdict not to IAI's liking were the releases disclosed. Such action on IAI's part is clearly fraud on the court.

It is also relevant to the issue of IAI's fraud on the court that shortly after the verdict, IAI's attorneys demanded of the individual crew members that pursuant to the releases they reduce the amount of their claim against SP by 65%, the amount by which IAI would be obligated to reimburse SP.[11] This demand occurred despite IAI's argument that its New York counsel did not understand the import of the releases. Clearly this is an indication that

---

[11] See Dr. Hermann's affidavit, p. 6. Again, though this is an unsworn affidavit, the court will recognize its existence. See note 8, *supra*.

the New York counsel entirely understood the import of the releases, and merely waited until after a verdict had been handed down to reveal the releases' existence.

In sum, this court holds that both the individual crew members and IAI have perpetrated a fraud on the court.

IAI's failure to produce the releases, Schierberl's false assurance to defendants that the entire crew members' files would be forwarded, Muscatel and Landau's false answers to written questions and Muscatel's misleading response at his deposition, are all evidence of a pattern of deception clearly meant to frustrate discovery of the releases by defendants and to deprive the defendants, court and jury of information having an important bearing on the dispute. The plaintiffs in this action had no reason to believe that the releases were known to the defendants. *Kupferman* v. *Consolidated Research and Manufacturing Corp., supra.* In fact, the attorneys here helped to make certain the releases remained secret. Plaintiffs' behavior mandates the imposition of the extreme sanctions available under Rule 60. *Hazel-Atlas Glass Co.* v. *A. Hartford Empire Co., supra; cf. Kupferman* v. *Consolidated Research and Manufacturing Corp., supra.*

Accordingly, the complaints of the plaintiff crew members and plaintiff IAI are dismissed in their entirety by the court *sua sponte.* The cross-motions are denied as moot. Defendants SP and Rockwell are awarded their costs.

IT IS SO ORDERED.

Dated: New York, New York
October 26, 1976

/s/ ROBERT L. CARTER
Robert L. Carter
U.S.D.J.

Affidavit of William L. Schierberl Requesting Opportunity to Present Testimony Before the Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

WILLIAM L. SCHIERBERL, being duly sworn, deposes and says, that:

1. I am an attorney admitted to practice before the bar of this Court and the courts of the State of New York. I am a member of the firm of Condon & Forsyth and have been counsel, since the inception of this lawsuit, to plaintiff Israel Aircraft Industries. As such, I am familiar with the memoranda, correspondence, pleadings, discovery and other documents relating to this lawsuit which arises from the crash on January 21, 1970, of a Jet Commander aircraft, Serial #029, owned and operated by Israel Aircraft Industries, near Kalkilia in Israel.

2. At the trial of the action, I participated as counsel for plaintiff Israel Aircraft Industries. While initially retained by the plaintiff crew members Zohar Landau, Mordechai Muscatel, and Hagai Koren, the firm of Fuchsberg & Fuchsberg was substituted for my own firm, Condon & Forsyth on July 23, 1974.

3. Our firm's post-trial motion on behalf of plaintiff Israel Aircraft Industries placed in issue Deeds of Release signed by the plaintiff crew members in 1971. This Court's

Affidavit of William L. Schierberl Requesting Opportunity to Present Testimony Before the Court

opinion of October 27, 1976, decided that motion by dismissal of the complaints of all plaintiffs contains the suggestion that I knew of the existence of the Deeds of Release prior to the trial and alleges that I waited until after the verdict had been handed down to reveal the existence of these releases. Court's opinion p. 19.

4. I first learned of the possible existence of these releases after the trial on liability had ended. Specifically, I was told by Norman Cousins, counsel for the plaintiff crew members, after the trial on liability, that Mr. Cousins had been told by plaintiff Zohar Landau that Mr. Landau remembered signing a paper which might effect any responsibility of Israel Aircraft Industries as to the crew.

5. Promptly thereafter, that is, on January 31, 1976, I telexed Mr. Y. Atsmon, Insurance Officer for Israel Aircraft Industries, as follows:

> "Further, Zohar Landau has asked that we obtain a copy of an agreement which he recalls signing in your office. He has described it as being a legal document written in Hebrew concerning the subject of his reimbursement and possibly containing a hold harmless clause between himself and Israel Aircraft Industries. If possible he would appreciate obtaining a translation by someone, in your legal department or by yourself."

The original of this telex which contains other matter, not material here, is annexed hereto as Exhibit A.

Affidavit of William L. Schierberl Requesting Opportunity to Present Testimony Before the Court

6. On February 3, 1976, a translation of the Deed of Release signed by Zohar Landau was transmitted by telex from the offices of Israel Aircraft Industries in Tel Aviv to the office of Israel Aircraft Industries in New York. The original of this telex is annexed to the present motion as Exhibit B. This telex was delivered to my office on February 4, 1976, the same day that the trial concluded with the jury's verdict as to damages.

7. I did not see the telex until I returned to my office after the verdict. I at no time prior thereto saw this Deed of Release or any copy thereof. I at no time heard that such a document might exist until after the trial on liability had ended.

8. Further, from February 4, 1976 until at least March 15, 1976, I did not have a legal opinion under the law of Israel that an employee has a right of action against an employer for injuries sustained in the course of employment. This knowledge came to me at conferences in Tel Aviv extending over the dates March 15, 16 and 17, 1976, with my firm's counsel and IAI in Israel. It was at this same time that I received for the first time, a full translation of all three Deeds of Release. Prior thereto I had only seen the telex version delivered to my office on February 4, 1976.

9. I at all times prior to the conclusion of the trial was completely unaware that, under the law of Israel, an employee has a right of action against an employer for injury sustained in the course of employment. At all times prior thereto, I believed the payments received by the

crew from Israel Aircraft Industries were made pursuant to a system of Workmen's Compensation similar to that in the United States, and that, as such was the exclusive remedy of the employee crew members against their employer Israel Aircraft Industries.

10. I expressed this view to the Court on January 28, 1976, following the trial on liability, as appears at page 1714-15 of the trial transcript, as follows:

> "THE COURT: Gentlemen, I forgot to mention it yesterday, but obviously there is a need and a very quick need for your requests to charge, and I want them in today.
>
> Secondly, I think that by virtue of the jury's decision, I trust that all of you now realize how this case has been realigned, and that is that the individual—and I am going to tell the jury that—the individual plaintiffs are now in fact suing Israel Aircraft Industries and Standard Precision and Israel Aircraft is suing Standard Precision. That's how the case is.
>
> I want to be sure everybody understands that.
>
> MR. SCHIERBERL: On that point, of course, I respectfully except and I would like an opportunity, because of the importance of it, to brief that point and I would like to be heard on motions before the case goes to the jury in that respect.
>
> THE COURT: You can do anything you want. That point is that as I now understand the law of comparative negligence, the jury has decided that Israel Aircraft is responsible for 65 percent of it and, therefore,

there is a contribution. Any award is going to have to be shared between the two of you. There is nothing I can do about that.

MR. SCHIERBERL: We have certain defenses in that regard, including the exclusive remedy of Workmen's Compensation, which has been paid.

THE COURT: But the problem with that in terms of Workmen's Compensation, it appears to me if you want that to be considered you are going to probably have to plead that. That is not the issue. The issue, as far as I now understand it, is that whatever the jury awards to these individuals, if it awards anything, has to be shared between the two people that they said are responsible for the accident.

MR. SCHIERBERLS If your Honor please, I do not believe the law is that settled and I would like to be heard on it."

11. On March 15 or March 16, 1976 I spoke by telephone from Tel Aviv with Dennis Murphy, Esq., counsel for the defendants. To the best of my recollection, I told Mr. Murphy in the course of this conversation that I had, at that time, seen the full texts of the translations of the several Deeds of Release. Further, upon my return to New York, I placed the Deeds of Release before the Court, that is, on March 26, 1976.

12. The Court in its opinion of October 27, 1976, further refers to my "false assurance to defendants that the entire crew members files would be forwarded . . ." The Court had previously concluded, at page 7 of Court's Opinion, that the releases were not included in the material

turned over to defendants. I did not know at that time, that any releases existed. Therefore, I could have not have known whether or not such releases would, in the ordinary course of business, be kept in the personnel files of the crew members.

13. In summary, I did not see all of the Deeds of Release prior to March 15, 1976. I did not have an opinion of Israeli counsel as to the legal effect of these releases before that date. At the time I first learned of the possibility that a document in the nature of the release existed, I immediately obtained a telex translation of the Deed of Release of Zohar Landau. I continued at that time to believe that this release related to payments in the nature of Workmen's Compensation. The fact that total payments approximating US$11,000 were paid to the crew by Israel Aircraft Industries was made known to the defendant early in the discovery. There was never any effort or intent to mislead defendants or defendants' counsel. There was never any effort or intent to mislead the Court. The Deeds of Release were placed before the Court as soon as practicable after full translations and an opinion as to their legal effect were obtained.

In this circumstance, I respectfully request that I be given an opportunity to present sworn testimony before this Court relating to my knowledge, actions, and intent with respect to the matters which were the subject of this Court's opinion of October 26, 1976, as well as any other related matters into which the Court or counsel may wish to inquire.

Respectfully yours,

/s/ WILLIAM L. SCHIERBERL
William L. Schierberl

(Sworn to November 5, 1976.)

Exhibit A Annexed to Foregoing Affidavit

(Telegram Dated January 31, 1976)

GA
Illegible
Illegible
31 1711 027190
31114 ISRAV IL
RCA 11733 1711
GA
224556 CAF UR

JANUARY 31, 1976

MR. Y. ATSMON

RE: ISRAEL AIRCRAFT INDUSTRIES V. NORTH AMERICAN ROCKWELL

WE HAVE RECEIVED YOUR TELEX OF JANUARY 29, 1976 AND SHALL MAKE EVERY EFFORT TO INCLUDE CONSEQUENTIAL DAMAGES OF IAI AS AN ELEMENT OF DAMAGES IN OUR CASE. HOWEVER, IT IS UNLIKELY THAT THE COURT WILL PERMIT SUCH AN AMENDMENT AT THIS LATE DATE. WE SHALL KEEP YOU ADVISED IN THIS REGARD.

IN THE MEANTIME, PLEASE PROVIDE FURTHER BREAKDOWN OF LOSS OF INVESTMENT TOTALLING 18.5 MILLION DOLLARS AND DETAILED FACTS TO SUPPORT LOSS ARISING FROM THE EIGHT MONTH DELAY IN THE CERTIFICATION PROGRAM RESULTING FROM THE CRASH OF 029.

FURTHER, ZOHAR LANDAU HAS ASKED THAT WE OBTAIN A COPY OF AN AGREEMENT WHICH

Exhibit A—Telegram Dated January 31, 1976

HE RECALLS SIGNING IN YOUR OFFICE. HE HAS DESCRIBED IT AS BEING A LEGAL DOCUMENT WRITTEN IN HEBREW CONCERNING THE SUBJECT OF HIS REIMBURSEMENT AND POSSIBLY CONTAINING A HOLD HARMLESS CLAUSE BETWEEN HIMSELF AND IAI. IF POSSIBLE, HE WOULD APPRECIATE OBTAINING A TRANSLATON BY SOMEONE IN YOUR LEGAL DEPARTMENT OR BY YOURSELF.

THANKS AND REGARDS,

SCHIERBERL
CONFORATTY/NEW YORK

31114 ISRAV IL
0003.3

Exhibit B Annexed to Foregoing Affidavit

(Telegram Dated March 2, 1976)

MENDES FOR SCHIERBERL

T-3124 3.2.76

FLWG COMPENSATION PAID TO CREW PEP RELEASE DOCUMENTS LANDAU IL 75,000.—MUSCATEL 10,000.—KOREN 5000.—IN ADDITION WE REIMBURSED AND PAID INCIDENTAL EXPENSES AMOUNTING IN CASE OF LANDAU TO AT LEAST IL 10,000 AND SMALLER AMOUNTS FOR KOREN AND MUSCATEL.

BELOW PLS FIND TRANSLATION OF LANDAU RELEASE, OTHERS SUBSTANTIALLY IDENTICAL. PLS EXCUSE POOR ENGLISH.

RELEASE AND FINAL AND FULL AGREEMENT

1) THE UNDERSIGNED ZOHAR LANDAU IDENTITY NR 832055 OF 12 TALLALIM STREET RAMAT GAN, EMPLOYEE OF IAI EMPLOYEE NR 16242 DECLARE HEREWITH AS FOLLOWS:

WHEREAS I WAS INJURED IN THE ACCIDENT OF JET COMMANDER 4X-COJ ON JAN. 21, 1970 I SUFFERED DAMAGE AND 43 PERCENT PERMANENT DISABILITY WAS DETERMINED BY THE NATIONAL INSURANCE INSTITUTE.

(NOTE: THIS IS THE GOVERNMENT AGENCY DEALING WITH ACCIDENTS AT WORK) AND WHEREAS I CAME TO A FULL AND FINAL AGREEMENT WITH THE ISRAEL AIRCRAFT INDUSTRIES LTD. (HEREINAFTER IAI) AND THE MINISTRY OF

Exhibit B—Telegram Dated March 2, 1976

DEFENSE, WHO WITHOUT ADMITTING RESPONSIBILITY FOR THE SAID ACCIDENT OR THEIR OBLIGATION TO DO SO, AGREED TO PAY ME COMPENSATION AS DETAILED BELOW, AND THIS IN FULL COMPLETE AND FINAL SETTLEMENT OF ALL MY CLAIMS AND DEMANDS IN REGARD OF ANY AND EVERY THING CONNECTED WITH OR DUE TO THE ABOVE ACCIDENT, EXCLUDING THE DISABILITY PENSION PAYABLE TO ME BY THE NATIONAL INSURANCE INSTITUTE.

THEREFORE I CONFIRM DECLARE AND UNDERTAKE HEREWITH AS FOLLOWING I HAVE RECEIVED FROM IAI THE AMOUNT OF 75,000 (SEVENTY FIVE THOUSAND) LIRE IN FULL COMPLETE AND FINAL SETTLEMENT OF ALL MY CLAIMS AND DEMANDS AGAINST IAI AND/OR MOD IN REGARD OF ANY AND EVERY THING DIRECTLY OR INDIRECTLY, CONNECTED WITH OR DUE TO THE ACCIDENT OF THE ABOVE SAID AIRCRAFT (EXCLUDING THE DISABILITY PENSION OF THE NATIONAL INSURANCE INSTITUTE)

2. THE AMOUNT SPECIFIED ABOVE INCLUDES FULL, COMPLETE AND FINAL COVER FOR ALL DAMAGES AND OR LOSSES OF ANY KIND WHICH WERE CAUSED TO ME AND/OR MAY BE CAUSED TO ME AT ANY TIME AS A RESULT DIRECTLY OR INDIRECTLY OF THE ABOVE SAID ACCIDENT.

3. IN CONSIDERATION OF THE RECEIPT OF THE AMOUNT I HEREWITH WAIVE ALL MY CLAIMS AND DEMANDS INCLUDING WAIVER OF ANY INSURANCE WHICH MIGHT BE PAYABLE TO IAI

Exhibit B—Telegram Dated March 2, 1976

AND OR MOD UNDER ANY POLICY OR INSURANCE AGREEMENT IN RESPECT OF MY ABOVE SAID INJURY AND DISABILITY CONNECTED WITH DAMAGES AND/OR LOSSES DUE TO THE ABOVE ACCIDENT AND I HEREBY RELEASE IAI AND OR MOD AND/OR ANY ONE PERSON AND OR ANY ONE LEGAL ENTITY IN THEIR NAME AND/OR THEIR BEHALF, FROM ANY RESPONSIBILITY AND/OR LIABILITY WHATSOEVER IN CONNECTION WITH THE ABOVE ACCIDENT.

4. I HEREWITH DECLARE AND CONFIRM THAT NEITHER I AND/OR ANY PERSON AND/OR ANY LEGAL ENTITY ACTING IN MY NAME AND/OR ON MY BEHALF DO NOT HAVE AND WILL NOT HAVE ANY CLAIMS OR DEMANDS AGAINST IAI AND/OR MOD AND/OR ANY PERSON AND/OR LEGAL ENTITY IN THEIR NAME AND/OR ON THEIR BEHALF IN RESPECT OF THE ABOVE ACCIDENT AND/OR CONNECTED THEREWITH AND OR DUE THERETO, DIRECTLY OR INDIRECTLY INCLUDING A CLAIM UNDER THE LAW AMENDING THE CIVIL TORTS. LAW (MAKING GOOD OF BODILY DAMAGES). 1964 AND I UNDERTAKE TO INDEMNIFY THE RECIPIENT OF THE CLAIM OR DEMAND, IF SUCH A DEMAND SHOULD BE MADE BY A PERSON OR LEGAL ENTITY, FOR ANY PAYMENT HE HAS TO BEAR IN CONNECTION WITH THE ABOVE ACCIDENT UP TO THE AMOUNT OF 75,000 LIRE.

5. I CONFIRM AND AGREE THAT ON PAYMENT OF THE AMOUNT IAI IS NOT OBLIGED AND WILL NOT BE OBLIGED TO EMPLOY ME IN THE FUTURE AS

Exhibit B—Telegram Dated March 2, 1976

A PILOT, BUT AS AN ENGINEER ON THE USUAL CONDITIONS AT IAI FOR ENGINEERS AND THAT IF IAI WILL BE INTERESTED AT ANY FUTURE TIME TO ENGAGE ME AS A PILOT, AND I WILL BE INTERESTED THEREIN, THE CONDITIONS OF SUCH EMPLOYMENT WILL BE DISCUSSED AND AGREED SEPARATELY BETWEEN US TAKING INTO ACCOUNT THE FACT THAT COMPENSATION WAS PAID TO ME UNDER THIS OBLIGATORY AGREEMENT.

6. IT IS KNOWN TO ME THAT SOLELY UPON MY ABOVE CONFIRMATION AND DECLARATION IAI HAS AGREED TO PAY ME THE AMOUNT OF 75,000 (SEVENTY FIVE THOUSAND) LIRE.

SIGNED—ZOHAR LANDAU

THIS JANUARY 20, 1971

I THE UNDERSIGNED BEN ZVI PINHAS ATTORNEY-AT-LAW CONFIRM HEREWITH THAT ABOVE RELEASE WAS SIGNED BY MR. ZOHAR LANDAU IDENTITY NR 832055 ON THE 1.20.71 AND THIS AFTER HAVING READ AND AFTER IN THOROUGHLY EXPLAINED ITS CONTENTS AND ALL CONSEQUENCES FLWING THEREFROM.

PINHAS BEN ZVI

Notice of Motion of Plaintiff Israel Aircraft Industries, Ltd. for Reargument and Reconsideration Pursuant to Local Rule 9

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the Order of the Honorable Robert L. Carter, dated the 26th day of October 1976 and filed with the Clerk of the Court on October 27, 1976 dismissing the complaints of plaintiff crew members and plaintiff Israel Aircraft Industries, Ltd. *sua sponte,* plaintiff Israel Aircraft Industries, Ltd. hereby moves for reargument and reconsideration of the aforesaid Order, pursuant to Local Rule 9, on the grounds that there is no factual or legal basis for the dismissal of the Complaint of plaintiff Israel Aircraft Industries, Ltd. or for the Court's allegations of fraud or misconduct on the part of Israel Aircraft Industries, Ltd. and/or its counsel, Condon & Forsyth.

PLEASE TAKE FURTHER NOTICE that plaintiff Israel Aircraft Industries, Ltd. requests that this Court direct that a Hearing be held as to the facts upon which this Court has based its allegations of fraud or misconduct on the part of plaintiff Israel Aircraft Industries, Ltd. and/or its counsel, Condon & Forsyth.

PLEASE TAKE FURTHER NOTICE that plaintiff Israel Aircraft Industries, Ltd. requests the opportunity to submit sworn affidavits and to take sworn testimony as to this Court's allegations of fraud and misconduct on the part of plaintiff Israel Aircraft Industries, Ltd. and/or its counsel, Condon & Forsyth.

Notice of Motion of Plaintiff Israel Aircraft Industries, Ltd. for Reargument and Reconsideration

PLEASE TAKE FURTHER NOTICE that plaintiff Israel Aircraft Industries, Ltd. moves the Court to accept the affidavit of William L. Schierberl sworn to November 5, 1976 as if ordered by the Court pursuant to Local Rule 9.

PLEASE TAKE FURTHER NOTICE that upon all the facts and proceedings heretofore had herein the undersigned will bring this Motion on for Hearing before the Honorable Robert L. Carter at the United States District Courthouse for the Southern District of New York on the 19th day of November, 1976 at 10:00 o'clock in the forenoon thereof for an Order to withdraw and expunge from the record the Order of this Court filed on the 27th day of October, 1976 and enter judgment for Israel Aircraft Industries, Ltd. against Standard Precision for damages awarded, and for such other and further relief as to this Court may seem just and proper in the circumstances.

Israel Aircraft Industries, Ltd. requests oral argument of this motion.

Dated: New York, New York
November 5, 1976

Yours, etc.

CONDON & FORSYTH

By /s/ THOMAS J. WHALEN
Thomas J. Whalen
A Member of the Firm
Attorneys for Plaintiff
Israel Aircraft Industries, Ltd.
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 757-6870

Notice of Motion of Plaintiff Israel Aircraft Industries, Ltd. Pursuant to F.R.C.P. Rules 59 and 60 and General Local Rules 4 and 9

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affidavits of Selvyn Seidel and Herzela Ron, sworn to on the 5th day of November 1976; and upon all the facts and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Robert L. Carter at the United States District Court for the Southern District of New York on the 19th day of November, 1976, pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure, and General Local Rules 4 and 9, for an order permitting Hale Russell Gray Seaman & Birkett ("Hale Russell") to appear as special additional counsel for plaintiff Israel Aircraft Industries, Ltd., ("IAI") and granting relief to IAI relating to motions for reconsideration, alteration and amendment of this Court's decision of October 26, 1976, and for related relief and such other relief as to this Court seems proper.

Dated: New York, New York
November 5, 1976

HALE RUSSELL GRAY SEAMAN & BIRKETT
By /s/ SELVYN SEIDEL
Selvyn Seidel
Attorneys for Plaintiff Israel Aircraft Industries, Ltd.
122 East 42nd Street
New York, New York 10017
Tele: (212) 697-1850

Affidavit of Selvyn Seidel in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

SELVYN SEIDEL, being sworn, says:

1. I am a member of the law firm of Hale Russell Gray Seaman & Birkett, 122 East 42nd Street, New York, New York. My firm has been authorized by Israel Aircraft Industries, Ltd. ("IAI") to act as special counsel for it in this proceeding on the grounds that

(a) IAI may have differences of interest with its counsel of record, Condon & Forsyth, or Condon & Forsyth's retaining client, the insurers of IAI;

(b) IAI has not had any opportunity to be heard directly in connection with this Court's decision dated October 26, 1976 finding it had committed fraud on this Court; and

(c) this Court has reached an incorrect decision concerning IAI—a decision having enormous adverse consequences upon IAI's integrity—by an incomplete and insufficient record. Unless corrected a serious injustice will have occurred.

2. Throughout this proceeding, IAI has been nothing more than a nominal plaintiff named to prosecute the subrogation claims of its insurers. It has been represented by

counsel for such insurers, Condon & Forsyth. IAI has had virtually nothing to gain or lose in the lawsuit. IAI was paid $800,000.00 by its insurers to compensate for loss of the aircraft shortly after the accident. It has asserted no claim for consequential damages. It was not IAI's suggestion but apparently that of the insurers that the employees be brought into this action.* See accompanying affidavit of Mrs. Ron.

3. IAI was stunned to learn it was held to have committed fraud. It had no real opportunity to submit affidavits, documents, or other evidence relating to the motions. It firmly believes this Court would never have reached the conclusion it did, were all the facts before it. See accompanying affidavit of Mrs. Ron.

4. The adverse impact of this Court's decision of fraud are enormous. IAI is a corporation owned by the government of Israel. It is one of the largest and one of the most respected industries in Israel. Its volume of business with the United States exceeds $100,000,000.00 annually. Its reputation must remain intact. See accompanying affidavit of Mrs. Ron.

5. IAI has thus asked us to represent its independent interest in this and any other proceeding arising therefrom that might be necessary, exclusive of the interest of any other party, insurer or counsel. We were first contacted

---

* There have been assertions that IAI might receive up to $20,000.00 back from the employees if the employees won an award in the action. The circumstances of these arrangements is one matter about which this Court should have more information. Regardless, such a comparatively small amount could hardly and indeed did not induce IAI to commit any wrong here.

four days ago, immediately on IAI's learning of Your Honor's decision. We have accordingly had little time to review the complex facts and law involved here, and believe a full view is required. This would entail a trip to Israel and perhaps England (where we understand counsel for the insurers who retained Condon & Forsyth are located), the interviewing of many persons, and the review of numerous documents. We believe at least thirty (30) days are needed to develop the evidence and information necessary to submit to this Court.

6. We thus respectfully request that this Court enter an order providing:

(a) Hale Russell Gray Seaman & Birkett become additional counsel of record in this proceeding, representing the sole interest of IAI;

(b) as additional counsel of record, we be allowed to submit on behalf of IAI appropriate motions and papers in this proceeding, including applications and papers under Local Rule 9 or under Federal Civil Procedure Rules 59 and 60, and including papers and other evidence in connection with any other applications which may be made or proceeding which may occur in connection with this Court's October 26 decision;

(c) IAI be given until December 6, 1976 to submit any such motions for relief, affidavits, documents or other evidence to this Court; and

(d) for such other relief as to this Court seems just.

7. If for any reason IAI is not given until December 6, 1976 to submit motions under Local Rule 9 and Rule 59, this affidavit, and the affidavit of Mr. Ron shall be deemed

to have been submitted under these Rules on November 5, 1976 in support of motions for reconsideration and to alter or amend the judgment of this Court, eliminating and reversing all statements and conclusions as to IAI's fraud; and we further request permission to submit in connection with these motions additional appropriate affidavits, documents, and other papers and evidence on or before December 6, 1976.*

8. Condon & Forsyth have been informed of the substance of the motions we are making.

/s/ SELVYN SEIDEL
Selvyn Seidel

(Sworn to November 5, 1976.)

---

* IAI of course reserves whatever rights it may have to seek additional relief, such as under Rule 60, at another time.

Affidavit of Herzela Ron in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

HERZELA RON, being duly sworn, deposes and says:

1. I am, and at all times pertinent to this action have been, General Counsel for Israel Aircraft Industries, Ltd. ("IAI").

2. IAI was shocked to learn of this Court's decision of October 26, 1976 that IAI had committed fraud. IAI believed all along it was fully complying with its obligations. To the best of my knowledge and belief, IAI did not know that issues had been raised in motions relating to supposed fraudulent conduct of IAI.

3. IAI's lack of information seems to have resulted from its nominal relationship to this law suit. IAI was fully covered by insurance in connection with the loss of the aircraft which gave rise to the law suit. It was named a party plaintiff only because of its contractual obligations to its insurance carrier. It has been represented by Condon & Forsyth, attorneys appointed by the insurers. It does not have, and never had, a monetary interest in whether its claims in this law suit stand or fall. Upon information and belief the suggestion of bringing the individual plaintiff

employees into this action was not initiated by IAI but by the insurers.

4. As a result of its lack of information, IAI had no opportunity to submit directly affidavits, documents, or other evidence in connection with accusations of fraud leading to this Court's decision. Had it been given this opportunity, it would have established beyond question that, as is the fact, IAI committed no fraud.

5. The conclusion of this Court that IAI had committed fraud is erroneous and must be corrected. It can be based only on lack of the correct or complete facts having been presented to the Court. IAI's reputation is impeccable, and must remain so. It is a government owned corporation and one of the largest industries in Israel, which does an annual volume of business with the United States in excess of $100,000,000. It is very highly regarded.

6. It is IAI's conclusion that in order to correct the record, IAI must be represented by independent counsel representing only its interest, and the full record of IAI's innocence must be developed. Towards this end, we have authorized Hale Russell Gray Seaman & Birkett to take whatever steps they deem appropriate on IAI's behalf, including becoming additional and special counsel of record in this litigation, and submitting whatever motions or papers are appropriate on IAI's behalf.

/s/ HERZELA RON
Herzela Ron

(Sworn to November 5, 1976.)

Notice of Motion of Plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren for Reargument and Reconsideration

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Norman Leonard Cousins, Esq. duly sworn to the 5th day of November, 1976; upon the affidavits of Zohar Landau, Mordechai Muscatel and Hagai Koren which will be submitted to this Court in support of this motion prior to the return date thereof; upon a copy of the attached affidavit of the crew members which will be submitted to the Court prior to the return date of this motion; and upon all the pleadings and prior proceedings heretofore had herein, the undersigned will move this Court before the Hon. Robert L. Carter, District Judge at the United States District Court for the Southern District of New York, U.S. Courthouse, Foley Square, New York, N.Y. on the 12th day of November, 1976 at 10:00 A.M., or as soon thereafter as counsel can be heard for an Order pursuant to Rule 9(m) of the Rules of the United States District Court for the Southern District of New York and pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for an Order granting renewal, reargument and reconsideration of the Court's opinion of October 26, 1976 and upon such renewal, reargument and reconsideration, withdrawing said Opinion as to Zohar Landau, Mordechai Muscatel and Hagai Koren and

Notice of Motion of Plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren for Reargument and Reconsideration

reinstating their complaint and jury verdict thereon, together with such other and further relief as to this Court may seem just and proper.

Dated: New York, N.Y.
November 5, 1976

Yours, etc.

FUCHSBERG & FUCHSBERG

By:.....
NORMAN LEONARD COUSINS
Attorneys for Plaintiffs
Zohar Landau, Mordechai
Muscatel and Hagai Koren
250 Broadway
New York, N.Y. 10007
(212) WO 2-2800

Affidavit of Norman Leonard Cousins in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

NORMAN LEONARD COUSINS, Esq., being duly sworn, deposes and says:

I am an attorney in the firm of Fuchsberg & Fuchsberg, attorneys for plaintiffs Landau, Mandel and Koren herein. I am admitted to practice in all of the Courts of the State of New York and am in good standing therein. I am also admitted to practice and in good standing in the United States District Court for the Southern District of New York and the Eastern District of New York. I am also admitted to practice and am in good standing in the United States Court of Appeals for the Second Circuit and before the United States Supreme Court.

I respectfully submit this affidavit in support of the crewmembers' motion pursuant to Rule 9(m) of the Rules of the Southern District of New York and Rule 60(b) of the Federal Rules of Civil Procedure for an Order granting renewal, reargument and reconsideration of this Court's Opinion of October 26, 1976 and upon such renewal, reargument and reconsideration withdrawing or modifying said Opinion to the extent of reinstating the complaints of

the crewmembers Landau, Muscatel and Koren and the Verdict of the Jury obtained thereon.

Attached hereto is a four-page unexecuted affidavit, originals of which will be signed and executed by each of the crewmembers and filed with this Court prior to the return date of this Motion. Due to the extended period of time it takes to mail papers to Israel and receive them back, it is not possible to attach the crewmembers' affidavits hereto.

I have, however, personally read the annexed unexecuted affidavit to Zohar Landau over the telephone to him in Israel. We went over each and every paragraph slowly and carefully and I asked him one by one if each paragraph was true. He indicated without any hesitation or qualification that each and every paragraph, as well as the whole affidavit, was completely true and that he would sign it, have it notarized and return to me as fast as Air Mail Special Delivery could bring it.

Hagai Koren called me at about 6:00 P.M. on November 4, 1976 from Montevideo, Uruguay. His affidavit was sent to him in Israel and there is no way he can get it prior to the return date of this motion. I read the annexed affidavit to him over the telephone exactly as I had done with Zohar Landau. Mr. Koren took it down in longhand, paragraph by paragraph, after indicating without hesitation or qualification that each and every paragraph, as well as the entire affidavit, was completely true and accurate. He indicated he would attempt to have it typed up if possible but, whether typed or handwritten, would bring it to the U.S. Embassy in Montevideo for notarization and would forward it to me by the fastest mail possible.

I have not been able to speak directly with Mordechai Muscatel because of the language barrier: I don't speak

Hebrew and he doesn't speak English. To this extent I must rely upon the fact that everything Mordechai Muscatel has ever told me or anyone in my law firm is consistent with each and every fact and statement contained in the affidavit annexed hereto. Zohar Landau is acting as my "go-between" with Mordechai Muscatel due to the language problem and I expect to receive Mr. Muscatel's affidavit properly executed within the next few days.

At this point the Court may well ask why did I wait until after the Court rendered its Opinion of October 26, 1976 to prepare or submit affidavits. The answer is I didn't. On October 1, 1976, almost a full month before the Court rendered its Opinion herein, I drafted the annexed affidavit for each of the crewmembers to execute based upon information received from them during the pendency of the motion. On October 1, 1976 I sent copies of the affidavit together with covering letters to each of the crewmembers via Air Mail.

Mail service between the United States and Israel and especially within Israel is so bad that by the time the Court's Opinion came down, the crewmembers had still not received either the affidavit or my covering letter of October 1, 1976.

In my letter of October 1, 1976 I had specifically advised each of the crewmembers that I had to have the affidavits returned, properly executed, *no later* than October 15, 1976 so that I could file them in Court no later than October 16, 1976. I thought during the period of time this motion was outstanding that affidavits from the crewmembers themselves would be of assistance to this Court in arriving at the truth and had the mail sevice not been so bad, the

Court would, in all probability, have had these affidavits prior to the issuance of its October 26th Opinion.

Before I go into the specific details of my firm's involvement in this case and when it began, I want it to be emphatically clear that at no time have I or any member of the Fuchsberg firm ever participated in, condoned, or had any knowledge of any fraud perpetrated by anyone on this Court, the defendants in this case or anyone else. At no time has there been any effort, conscious or unconscious, on the part of myself or my firm to conceal or hide any documents or information from the defendants or this Court. If we did not produce something it was because we did not have it and did not even know of its existence.

Fuchsberg & Fuchsberg was first retained by the crewmembers and their wives on July 16, 1974. Prior to that date we knew nothing about the case and had no involvement in it whatsoever. In fact, we had never even heard of it.

I was present during the initial interview with the clients on July 16, 1974 along with the two then senior members of the Fuchsberg firm. Hagai Koren was not present but had authorized Zohar Landau to act for him.

When we learned during the course of our meeting that the crewmembers had all been injured while working, we had actually inquired if there were any Workmen's Compensation liens and we were told by the crewmembers of both the existence of the liens and their amounts, and that it was their understanding that out of the proceeds recovered in this action that money would have to be repaid. No written agreements were shown to us nor were any requested. Our firm does not handle Workmen's Compen-

sation matters and the crewmembers did not ask us for any assistance or indicate any difficulty. Indeed the Workmen's Compensation end of the case had been concluded many years earlier. The crewmembers were completely open and candid about what payments they had received from their employer and that they understood the money would have to be repaid; we noted the existence of the liens on our files accordingly; and that was the end of the matter.

We contacted the firm of Condon & Forsyth, advised them of our retention, and received their cooperation in effectuating a formal substitution of our firm for theirs and requested the turnover of the complete file on the case. Specifically that first communication was by telephone between Abraham Fuchsberg of our office and William L. Schierberl of Condon & Forsyth.

During the month of August and the early part of September, Condon & Forsyth turned over to us what they represented to be photostatic copies of the entire file in the case. The documents were massive and I had no reason whatever to believe that anything was omitted therefrom. Nowhere in the entire file turned over to us or in the papers contained therein was there any deeds, releases, agreements between the crewmembers and their employer nor any reference thereto in any way.

There was included in the papers turned over to us by Condon & Forsyth copies of their answers to the interrogatories propounded by the defendants. These are referred to on Page 9 of the Court's opinion of October 26, 1976. They were prepared and served by Condon & Forsyth prior to our firm's retention in this case and at a time when Condon & Forsyth represented both the crewmembers and Israel Aircraft.

I read those answers in my review of the file prior to the crewmembers' depositions. The answers to defendants' interrogatories quoted by the Court on Page 9 of its Opinion were completely consistent with what the crewmembers had told us during our initial interview and completely consistent with what both William L. Schierberl and Marshall Turner of Condon & Forsyth told us during our meetings prior to the crewmembers' depositions. At that time there was absolutely no reason to believe that any of the statements contained in Answers 12 and 13 to the answers prepared by Condon & Forsyth to the defendants' interrogatories were untrue or inaccurate in any way.

On Page 7 of its Opinion, the Court refers to a January 10, 1974 meeting between Condon & Forsyth and Mendes & Mount. This meeting took place approximately six months before the Fuchsberg law firm ever came into the case. Obviously we had no knowledge of any documents that should have been disclosed but weren't nor did we know of the existence of any documents which should have been disclosed but weren't. I can say under oath that I never failed to turn over to Mendes & Mount any documents requested of me which I either had or knew existed. In fact, Mendes & Mount never requested any documents whatsoever of me.

The undersigned was present at the depositions of all three crewmembers. Zohar Landau's was held on July 22, 1974. Mordechai Muscatel's was held on July 24, 1974 and Hagai Koren's was held on September 5, 1974. In the case of all three crewmembers William L. Schierberl, representing at that point only IAI, participated in the review of each crewmember's testimony prior to his depo-

sition. Each of the crewmembers were still employees of Israel Aircraft at the time of their depositions and I could not, and, indeed, I had no reason to exclude Mr. Schierberl from participating in meetings with the crewmembers prior to their depositions. During these meetings, Mr. Schierberl, the crewmembers and myself reviewed the answers to interrogatories that Condon & Forsyth had previously served and the answers contained therein with respect to the payments received by the crewmembers from Israel Aircraft. Mr. Schierberl explained that the monies received by the crewmembers were liens which would have to be repaid out of the proceeds recovered in settlement of this action. That was clearly the understanding of the crewmembers insofar as they expressed it to me and, if Mr. Schierberl knew that his client possessed legitimate General Releases from the crewmembers, then he deliberately concealed it from me and the crewmembers during these meetings.

The Court quotes on Pages 7 and 8 of its Opinion from a portion of Mr. Muscatel's deposition. I sat right next to him as he gave those answers and each and every one of them was completely in accordance with what Mr. Schierberl had explained during the predeposition meetings and was in accordance with what I had read in Condon & Forsyth's answers to the defendants' interrogatories and was in accordance with everything I then knew and believed about their nature. The answers of Mr. Muscatel were open; they were not evasive and I believe were completely truthful based upon what he had been told by his employer and its attorneys concerning their nature. There is no doubt in my mind whatsoever that these crewmembers never knew they had given their employer a General Re-

lease surrendering all claims they might have for their injury of January 21, 1970 against everyone.

Throughout the depositions of the crewmembers, there was no hesitancy in their voice, no uncertainty and nothing to indicate to me that they had any doubt that they were telling the truth. Everything they testified to at their deposition was consistent with what I had had explained to me by Mr. Schierberl and what I read and understood from reading the interrogatories previously served by Condon & Forsyth. Nowhere in the entire file turned over to us by Condon & Forsyth was there anything to indicate anything to the contrary.

On Page 11 of its Opinion the Court states, "The Releases have been kept secret too long by plaintiff crewmembers and by IAI to allow the parties secreting the Releases to put their validity in issue at this juncture of the litigation." That conclusion may be true as to Israel Aircraft, but the crewmembers cannot be accused of deliberately secreting Releases they not only did not know they had signed, but were specifically told by their employer that they had not. The first time the crewmembers learned that they had supposedly signed valid General Releases was the same time both your deponent and the defendants in this case learned of it.

The Court goes on to state on Page 11 of its Opinion that, "Plaintiff crewmembers chose to bring this suit, without mentioning the Releases, and without asking the Court to determine their rights under these agreements." The Court must realize that until Israel Aircraft made its post-trial motion to amend its answer, neither the Fuchsberg firm, the crewmembers themselves nor the defendants in this case knew of any Releases or other agreements which

required any Court determination. Our firm understood that Israel Aircraft had a Compensation-type lien which we would honor. That is what the crewmembers understood and that is what the defendants understood. If anyone understood something to the contrary, it was Israel Aircraft and it was an understanding that they kept solely to themselves. The crewmembers did not conceal anything. They testified about their agreements with their employer and the monies they received to the extent of their understanding. Whatever that understanding was came from Israel Aircraft and its attorneys. The crewmembers should not be penalized because they had been lied to by their employer.

As the Court correctly stated on Page 5 of its Opinion, "Below the signature of each plaintiff-crewmember on his 'Release' is a signed statement by an attorney for IAI stating that he 'read and thoroughly explained' the contents of the Release to the person who signed it." That statement, even assuming it to be true, is meaningless because it does not indicate *what* was actually told to the crewmembers in explanation. That statement at the end of the "Release" is as consistent with an attorney telling the crewmembers they were releasing only Israel Aircraft and the Ministry of Defense as it is with an explanation that they were releasing all persons whether named in the Release or not. The statement by the attorney at the end of the "Release" does not state exactly what explanations were given to the crewmembers, nor does it state that the crewmembers were told that a "Release to one is a release to all". At best, it is a conclusory statement, but it does not indicate what explanations were actually given to the crewmembers.

The Court quotes from the Landau and Muscatel "Release" on Page 5 of its Opinion in the footnote. The language itself mentions releasing only IAI and/or The Ministry of Defense and/or any other person or entity in their stead. It does not mention that the Release is in favor of any and all persons. Most significantly, why should a lay crewmember without any legal education believe it is a Release to all persons when they are told by their employer that they may join with it in a suit against the persons responsible for their injury and then go ahead and make such arrangements for the crewmembers.

It should be emphatically clear from the affidavits of the crewmembers which are being submitted in support of this motion, that they were as much a victim of Israel Aircraft's fraud and deceit as were this Court and the defendants in this case.

On Page 8 of its Opinion the Court makes reference to possible separate agreements between the crewmembers and IAI separate and aside from the deeds given to IAI by the crewmembers.

Neither I nor anyone in my firm have ever seen or been given copies of such agreements. Israel Aircraft has never produced them and I do not know one way or another if indeed separate agreements of any sort are even in existence. It would be most helpful if such separate agreements are indeed in existence, that Israel Aircraft at least at this time produce them.

On pages 17 and 18 of its Opinion the Court criticizes me for not bringing these "Releases" to the attention of the Court during the trial. After the liability verdict had been brought in by the jury and we were into the damage portion of the trial, Landau or Koren came up to me and

said that a Mr. Otzman (I may be misspelling his name) in the Flight Test Personnel Department at Israel Aircraft had told him that the crewmembers may have signed some kind of Release. Koren or Landau (whichever one of the two mentioned it to me) asked me if there was anything to that. When we broke for lunch that day, I went over to Mr. Schierberl in the Courthouse cafeteria and asked him specifically if there was any truth to the information Koren or Landau had received that Israel Aircraft had some sort of General Release from the crewmembers. Mr. Schierberl told me without any hesitation or evasiveness that neither he nor his client had any general or other type of Release from the crewmembers and that he knew nothing of any release, document or agreement other than that the crewmembers had to repay to Israel Aircraft the compensation received from them. I conveyed that information to Koren or Landau and that was the end of the matter. I had no reason whatever to doubt Mr. Schierberl's honesty or integrity nor did I have any reason whatsoever to believe that he was not telling me the truth. In the context of what actually transpired I believe I had no obligation or reason based on that information to approach the Court and tell it that the crewmembers had given General Releases to their employer. I respectfully submit that my conduct was neither fraudulent nor dishonest. I had received what I believed to be honest and reliable information from an attorney who I respect and who is in good standing in this Court and who is in the best position to know whether or not his clients had obtained any Releases from the crewmembers. Our office has many matters with Condon & Forsyth, and while we have found them to be aggressive and formidable ad-

versaries, we have never had one occasion to find them guilty of dishonesty or underhanded dealing. I must respectfully take exception to the Court's position that I had an obligation to inform the Court of any Release when I was expressly assured by Mr. Schierberl whose integrity I had no reason to doubt that there was no such document or agreement in existence.

The Court states on Page 18 of its Opinion that, "It also finds that the crewmembers were equally guilty in not disclosing the Releases." I do not believe that is true, Sir. I sat next to each of the crewmembers during their depositions and I sincerely believe without any doubt whatsoever in my mind that they testified as fully, as openly and as honestly as they could about the "Releases" based on what they knew, what they were told and what they understood. If there is any doubt in the Court's mind about this after reading my affidavit and those of the three crewmembers, then I respectfully ask that it conduct a hearing in open Court so that this entire matter may be aired openly and under oath.

Lastly, the Court has commented in its Opinion upon my failure to submit an affidavit of my own earlier than this. Frankly, I thought it would have been of little use to the Court because our firm did not get into this case until July 16, 1974, and neither I nor anyone in my firm has any personal knowledge of what transpired before then. More importantly, I did submit over my name three memorandums, one of which was 37 pages in length. I felt at the time there was little I could add in an affidavit that I had not already presented in those memorandums. Rather than needlessly prolong this affidavit, or resubmit redundant memorandums, I respectfully incorporate all

three memorandums previously furnished to the Court by me in connection with these post-trial motions, with the same force and effect as though fully incorporated hereinafter at length. The only thing I would like to add thereto is the recent decision of the Appellate Division, Second Department in *Rosano* v. *Lustgarten,* NYLJ Oct. 29, 1976, p. 11, col. 3, attached hereto where the Court modified a General Release to reflect the true intentions of the parties notwithstanding that it was executed at a time when the general rule was in effect that, "A release to one is a release to all." The opinion by Justices Hopkins, Martuscello, Margett, Rabin and Hawkins is respectfully commended to this Court.

Lastly, Rule 9(m) of the Rules of the Southern District of New York, states that, "No affidavit shall be filed by any party unless directed by the Court." It is respectfully requested that this Court permit the filing of this affidavit not only under Rule 60(b) of the Federal Rules of Civil Procedure, but also under Rule 9(m) of the Rules of the Southern District.

I apologize to this Court for the length of this affidavit, but I have tried to make it as detailed, as complete and as accurate as possible. If there is any detail or aspect of my firm's involvement in this case or my own which the Court feels I should have commented upon or explained and have not, I pray this Court will give us an opportunity to do so under oath.

WHEREFORE, it is respectfully requested that the relief prayed for herein be granted in all respects, and that this Court grant renewal, reargument and reconsideration of its Opinion of October 26, 1976 and modified to the extent of reinstating the complaint of the crewmembers herein,

together with the counterclaim of the defendants against Israel Aircraft and the reinstatement of the jury's verdict thereon.

NORMAN LEONARD COUSINS

(Sworn to November 5, 1976.)

Attachment 1 to Foregoing Affidavit

(Blank Affidavit of Crew Members)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

AFFIDAVIT

STATE OF ISRAEL,
CITY OF , *ss.*:

, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action, and respectfully submit this affidavit in response to Israel Aircraft's and defendants' claim that I had, prior to the commencement of this action, executed and delivered to Israel Aircraft a General Release with the intent that said document release all claims I might have against any parties responsible for the injuries I sustained on January 21, 1970 in an accident involving Jet Commander 4X-COJ.

2. At the time of both the accident and the execution and delivery of a Deed of Release and Full and Final Accord, I was an employee of the Israel Aircraft Industries, Ltd. I was not represented by counsel and knew nothing of either the nature or effect of this document except for what I was told by Israel Aircraft and its attorneys. I have no legal training and no experience with these matters or documents.

Attachment 1 to Foregoing Affidavit

3. I knew that as a result of the injuries I sustained on January 21, 1970, when I was injured in the course of my employment, I was entitled to compensation from Israel Aircraft. Without any suit or formal claim being made by me, Israel Aircraft paid me compensation and required me to sign a Deed of Release and Full and Final Accord.

4. It was explained to me by Israel Aircraft and its attorneys that my signing of this deed would, in no way, effect my rights to bring a claim against the manufacturer of the aircraft or its components in the United States. In fact, Israel Aircraft indicated to me that it would retain attorneys for me in New York to join with it in suing the defendants in this case.

5. It was explained to me by Israel Aircraft and its attorneys that the deed I was signing released only Israel Aircraft and the Ministry of Defense. I had never heard of the legal proposition that, "A release to one is a release to all," and the Accord I signed stated that it released only "IAI and/or the Ministry of Defense and/or any one of them and/or any other person or legal body in their name and/or in their stead." I understood this to mean that I was releasing only IAI and the Ministry of Defense, and that is what was explained to me by Israel Aircraft and its attorneys.

6. I had no desire to release any of my rights against the defendants in this case or any other persons responsible for the accident in which I was injured. Had I known that was the legal effect of the deed I signed, I never would have signed it.

Attachment 1 to Foregoing Affidavit

7. The explanations and representations made to me by Israel Aircraft and its attorneys were to the effect that the deed I signed referred to and acknowledged only the settlement of my compensation claim against my employer.

8. After I signed the deed of release and gave it to my employer as requested, my employer went ahead and did what it said. It retained the law firm of Condon and Forsyth in New York to represent me, my fellow crew members and itself in a suit against the defendants herein for the damages we respectively sustained.

9. During the entire time I was represented by Condon and Forsyth, I was counseled and encouraged by that law firm that my case was a good and valid one and I was never told by Condon and Forsyth nor was it ever suggested that I had signed my rights away or done anything to adversely effect my claim against the defendants in this case.

10. If the document I signed was a General Release, releasing all my rights against any persons responsible for the injuries I sustained in the accident of January 21, 1970, it was obtained from me by Israel Aircraft fraudulently, dishonestly and through misrepresentation.

.....

(Sworn to October , 1976.)

Attachment 2 to Foregoing Affidavit

NEW YORK LAW JOURNAL, Vol. 176—No. 84, P. 11, Col. 3
Fri., Oct. 29, 1976

SECOND JUDICIAL DEPARTMENT—APPELLATE DIVISION

By Hopkins, Acting P.J.; Martuscello, Margett, Rabin and Hawkins, JJ.

ROSANO, plf. v. LUSTGARTEN, def.—In a negligence action to recover damages for personal injuries, etc., defendants-third-party plaintiffs appeal from so much of an order of the Supreme Court, Suffolk County, dated Dec. 11, 1975, as directed (1) that the principal action shall continue, (2) that the third-party defendant be released from further liability to plaintiffs and defendants third-party plaintiffs, (3) that the third-party defendant shall not be entitled to contribution for payments made to plaintiffs and (4) that the cross-motion by defendants third-party plaintiffs for reargument be dismissed.

Order affirmed in so far as appealed from, with one bill of costs to respondents appearing separately and filing separate briefs.

Plaintiff Biagio Rosano (Rosano) was playing golf with his friend Donald Vincent, the third-party defendant, at the premises of the defendant third-party plaintiff Middle Island Country Club (Country Club). During the course of the game, Vincent hit a ball which struck Rosano in the eye. As a result of the injury, Rosano's eye was surgically removed.

After his discharge from the hospital, Rosano entered into settlement negotiations with Vincent's insurer. During these discussions, mention was made by Rosano of the possibility of his bringing an action against the Country Club. The insurer's representative, who is not an attorney,

merely shrugged his shoulders and expressed no opinion as to the effect of the release upon such an action. However, the release was in broad terms and did not reserve a claim against the Country Club. Indeed, the printed portion of the release discharged from liability "all other persons, firms or corporations," which of course included the Country Club. Nevertheless, Rosano executed the release for $21,000, intending to relieve *only* Vincent and his insurer from further liability. The maximum amount of coverage under the policy was $25,000.

Thereafter, Rosano commenced an action to recover damages for personal injuries against defendants, who in turn impleaded Vincent. Relying upon the broad terms of the release, defendants and Vincent moved to dismiss the complaint and the third-party complaint, respectively.

In our opinion, the record on this appeal clearly demonstrates that Rosano only intended to release Vincent and his insurer from liability and that Rosano and the insurer's agent operated under a mutual mistake as to the effect the release would have on the action against defendants. Under such circumstances, the release was properly modified to reflect the true intent of the named parties to the instrument (cf. General Obligation Law, sec. 15-108 which became effective after the release in question).

Affidavit of Zohar Landau dated November 7, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF ISRAEL,
CITY OF , *ss.*:

ZOHAR LANDAU, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action and respectfully submit this affidavit in response to Israel Aircraft's and defendants' claim that I had, prior to the commencement of this action, executed and delivered to Israel Aircraft a General Release with the intent that said document release all claims I might have against any parties responsible for the injuries I sustained on January 21, 1970 in an accident involving Jet Commander 4X-COJ.

2. At the time of both the accident and the execution and delivery of Deed of Release and Full and Final Accord, I was an employee of the Israel Aircraft Industries, Ltd. I was not represented by counsel and knew nothing of either the nature or effect of this document except for what I was told by Israel Aircraft and its attorneys. I have no legal training and no experience with these matters or documents.

3. As a result of the injuries I sustained on January 21, 1970, when I was in the course of my employment, Israel Aircraft agreed, without any suit or formal claim being

made by me or on my behalf, to pay and did in fact pay me compensation in a relatively small amount covering only in part the injuries and heavy losses I have suffered in consequence of the accident.

4. In connection with the above payment Israel Aircraft required that I sign a Deed of Release, but it was made quite clear to me by Israel Aircraft and its attorneys that my signing of this deed would, in no way, affect my rights to bring a claim against the manufacturer of the aircraft or its components in the United States.

5. The accord I signed stated that it released only "Isreal Aircraft and/or the Ministry of Defense and/or any one of them and/or any other person or legal body in their name and/or in their stead". I had never heard of the legal proposition that a release to one may be a release to all, I never meant to release anyone except Israel Aircraft and the Ministry of Defense and never doubted that the Deed of Release I had signed operated only vis-a-vis Isreal Aircraft and the Ministry of Defense, and nobody else.

6. The explanations and representations made to me by Israel Aircraft and its attorneys were to the effect that the deed I signed referred to and acknowledged only the settlement of my compensation claim against my employer.

7. At the time of the signing of the Deed of Release I was certain, on the basis of the findings of expert committee set up by the Minister of Transportation to investigate the accident, that Israel Aircraft was not to blame for the accident and that the fault responsible for the accident rested, at least predominately, with Standard Precision,

the manufacturer of the defective component built into the aircraft.

8. It has always been my intention, therefore, to bring action against and claim compensation from Standard Precision, the party I considered to be directly responsible for the accident and for the injuries and losses I sustained. Naturally, I had no desire to release any of my rights against the defendants in this case or any other persons responsible for the accident in which I was injured.

9. If the document I signed was a General Release, releasing all my rights against any persons responsible for the injuries I sustained in the accident of January 21, 1970, it was obtained from me by Israel Aircraft through misrepresentation.

10. Had I known or even suspected that the Deed I signed may be interpreted to have the legal effect of a General Release releasing anyone except Israel Aircraft and the Ministry of Defense I never would have signed it.

11. The clause in the Deed of Release stating my obligation to repay Israel Aircraft the amount I received from Israel Aircraft as compensation, in the event that any third party bring action against Israel Aircraft in connection with the accident of January 21, 1970, clearly envisaged and provided for the possibility that I collect compensation from a third party, such as Standard Precision, such third party then bringing action to recover contribution from Israel Aircraft. This provision thus explicitly indicates that I and Israel Aircraft meant that I reserve all my rights against third parties, the defendants included.

Affidavit of Zohar Landau dated November 7, 1976

12. I firmly believed that the Deed of Release I signed was nothing more than an agreement not to sue Israel Aircraft or the Ministry of Defense, having no relevance to any third party. I quite innocently, saw no reason, therefor, why the existence of the Deed should be brought to the attention of the Court hearing my suit against the defendants in this case. I never meant to withhold nor did I believe I have withheld any relevant information from the Court hearing my suit.

/s/ ZOHAR LANDAU
Zohar Landau

(Sworn to and authenticated on November 7, 1976.)

Affidavit of Mordechai Muscatel dated November 7, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF ISRAEL,
CITY OF TEL-AVIV, *ss.:*

MORDECHAI MUSCATEL, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action, and respectfully submit this affidavit in response to Israel Aircraft's and defendants' claim that I had, prior to the commencement of this action, executed and delivered to Israel Aircraft a General Release with the intent that said document release all claims I might have against any parties responsible for the injuries I sustained on January 21, 1970 in an accident involving Jet Commander 4X-COJ.

2. At the time of both the accident and the execution and delivery of a Deed of Release and Full and Final Accord, I was an employee of the Israel Aircraft Industries, Ltd. I was not represented by counsel and knew nothing of either the nature or effect of this document except for what I was told by Israel Aircraft and its attorneys. I have no legal training and no experience with these matters or documents.

3. I knew that as a result of the injuries I sustained on January 21, 1970, when I was injured in the course of

my employment, I was entitled to compensation from Israel Aircraft. Without any suit or formal claim being made by me, Israel Aircraft paid me compensation and required me to sign a Deed of Release and Full and Final Accord.

4. It was explained to me by Israel Aircraft and its attorneys that my signing of this deed would, in no way, affect my rights to bring a claim against the manufacturer of the aircraft or its components in the United States. In fact, Israel Aircraft indicated to me that it would retain attorneys for me in New York to join with it in suing the defendants in this case.

5. It was explained to me by Israel Aircraft and its attorneys that the Deed I was signing released only Israel Aircraft and the Ministry of Defense. I had never heard of the legal proposition that, "A release to one is a release to all," and the Accord I signed stated that it released only "IAI and/or the Ministry of Defense and/or any one of them and/or any other person or legal body in their name and/or in their stead." I understood this to mean that I was releasing only IAI and the Ministry of Defense, and that is what was explained to me by Israel Aircraft and its attorneys.

6. I had no desire to release any of my rights against the defendants in this case or any other persons responsible for the accident in which I was injured. Had I known that was the legal effect of the deed I signed, I never would have signed it.

7. The explanations and representations made to me by Israel Aircraft and its attorneys were to the effect that

the deed I signed referred to and acknowledged only the settlement of my compensation claim against my employer.

8. After I signed the deed of release and gave it to my employer as requested, my employer went ahead and did what it said. It retained the lawfirm of Condon and Forsyth in New York to represent me, my fellow crew members and itself in a suit against the defendants herein for the damages we respectively sustained.

9. During the entire time I was represented by Condon and Forsyth, I was counseled and encouraged by that law firm that my case was a good and valid one and I was never told by Condon and Forsyth nor was it ever suggested that I had signed my rights away or done anything to adversely affect my claim against the defendants in this case.

10. If the document I signed was a General Release, releasing all my rights against any persons responsible for the injuries I sustained in the accident of January 21, 1970, it was obtained from me by Israel Aircraft fraudulently, dishonestly and through misrepresentation.

/s/ Mordechai (Muscatel) Magal
Mordechai Magal

(Sworn to and authenticated on November 7, 1976.)

Affidavit of Hagai Koren dated November 5, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

HAGAI KOREN being duly sworn deposes and says:

1. I am and of the plaintiffs in this action, and respectfully submit the affidavit in response to Israel Aircraft Industries and defendants claim that I had prior to the commencement of this action, executed, and delivered to Israel Aircraft Industries a general release with the intent that said document release or claim I might have against any parties responsible for the injuries I sustained on January 21st 1970 in an accident involving Jet Commander 4X-COJ.

2. At the time of both the accident and the execution and delivery of a deed of release, and full and final accord, I was an employee of Israel Aircraft Industries Ltd. I was not represented by counsel and knew nothing of either the nature or effect of this document except for what I was told by Israel Aircraft Industries and his attorneys.

   I have no legal training and no experience with this matter or document.

3. I knew as a result of the injuries I sustained on January 21st, 1970 when I was injured in the course of my employment, I was entitled to compensation from Israel Aircraft Industries without any sue of formal claim being made by me.

Israel Aircraft Industries paid me compensation and required me to sign a deed of release and final accord.

4. It was explained to me by Israel Aircraft Industries and its attorneys that my signing of this deed, would in no way, effect my right to bring a claim against the manufacturer of the Aircraft for its components in U.S.A.

   In fact, Israel Aircraft Industries indicated to me that it would retain attorney for me in New York to join with it in suing the defended in this case.

5. It was explained to me by Israel Aircraft Industries and its attorneys that the deed I was signing released only Israel Aircraft Industries and the Ministry of Defense.

   I had never heard of the legal proposition that "a release to one is a release to all", and the accord I signed stated that it released *only* "Israel Aircraft Industries and/or Ministry of Defense or any one of them or any other person or legal body in their name and/or in their stead".

   I understand that I was releasing *only* Israel Aircraft Industries and Ministry of Defense, and that is what was explained to me by Israel Aircraft Industries and attorney.

6. I had no desire or intention to release any of my rights against the defended in this case or any other person responsible for the accident in which I was injured, had I known that was the legal effect of the deed I signed, I never would have signed it.

7. The explanation and representation made to me by Israel Aircraft Industries and its attorneys were to

the effect that the deed I signed referred to and acknowledged only the settlement of my compensation claimed against my employer.

8. After I signed the deed of release and gave it to my employer as requested, my employer went ahead and did what it said it retained the lawfirm of Condon & Fourthy in New York represented me, my fellow crew members and itself in a sue against the defended herein for the damages we respectively sustained.

9. During the entire time I was represented by Condon & Fourthy, I was counseled and encouraged by that lawfirm that my case was a good and valid one and I was never told by Condon & Fourthy nor was it never suggested that I had signed my rights away or done anything to adversely effect my claim against the defended in this case.

10. If the document I signed was a general release, releasing all my rights responsible for the injuries I sustained in the accident January 21st, 1970 it was obtained from me by Israel Aircraft Industries fraudulently, dishonestly or through misrepresentation.

/s/ HAGAI KOREN
Hagai Koren

(Sworn to and Authenticated on November 5, 1976.)

Affidavit of Dennis C. Murphy in Response to Motions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

DENNIS C. MURPHY, after being duly sworn, deposes and says as follows:

1. I am an attorney admitted to practice before the Courts of the State of New York and before this Court, and I am associated with the firm of Mendes & Mount, attorneys for defendants, in the above captioned case.

2. I am familiar with all the proceedings heretofore had with respect to the above captioned case.

3. I submit this Affidavit on behalf of defendant, Standard Precision, in response to the various motions presented by plaintiffs concerning the opinion and order of this Court dated October 26, 1976 and filed October 27, 1976.

4. With respect to the Court's disposition of the request for an order to permit the firm of Hale, Russell, Gray, Seaman & Birkett to appear as special counsel for plaintiff Israel Aircraft Industries, Limited, the defendant Standard Precision takes no position.

Affidavit of Dennis C. Murphy
in Response to Motions

5. With respect to the various motions by plaintiffs requesting a reargument of those motions rendered moot by the Court's opinion and order of October 26, 1976, Standard Precision is of the opinion that the motions contain untimely factual presentments and provide no legal issues overlooked by the Court and, therefore, a reargument is not appropriate or necessary, however, should the Court find to the contrary Standard Precision requests that it be granted adequate time to respond and present appropriate opposition papers.

WHEREFORE, the defendant awaits the Court's decision regarding the appointment of a special counsel to act on behalf of Israel Aircraft Industries, Limited, and awaits the Court's disposition of the motions to reargue the Court's October 26, 1976 opinion and order and prays the Court that the defendants be granted an appropriate time to submit materials in opposition should any of the plaintiffs motions for reargument be granted.

Dated: New York, New York
November 11, 1976

/s/ DENNIS C. MURPHY
Dennis C. Murphy

(Sworn to November 11, 1976.)

Affidavit of Marshall S. Turner in Support of Motion

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

MARSHALL S. TURNER, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and associated with the firm of Condon & Forsyth, attorneys for plaintiff, Israel Aircraft Industries, Ltd. (hereinafter IAI) and I have actively participated in all of the proceedings heretofore had herein.

2. This affidavit is submitted in support of plaintiff IAI's Motion for Reconsideration and is based solely upon my personal knowledge concerning the production of documents which occurred during the pre-trial discovery proceedings of this litigation.

3. One of the primary bases for this Court's finding, in its Opinion dated October 26, 1976, of fraud or misconduct on the part of plaintiff IAI or its attorneys, Condon & Forsyth, was plaintiff IAI's failure to comply with a production of documents request by defendant Standard Precision (hereinafter SP). I submit this affidavit to clarify the facts concerning this finding.

Affidavit of Marshall S. Turner in Support of Motion

4. On July 5, 1973 defendant SP served upon counsel for IAI a Notice for Production of Documents which, in item 11, requests the following:

> 1. All personnel records of the individual plaintiffs which are in the possession or control of Israel Aircraft Industries, Ltd., including, but not limited to payroll, medical, hiring, training, and work of the individual plaintiffs as employees of said Israel Aircraft Industries, Ltd.

A copy of the Notice for Production of Documents is annexed hereto as Exhibit "A".

5. After considerable delay by defendants in the discovery proceedings, a production of documents and marking session was conducted on January 10, 1974. This meeting was attended by Mr. James FitzSimons of the law firm of Mendes & Mount, as attorneys for all defendants, and by Mr. William L. Schierberl and myself of the law firm of Condon & Forsyth, as attorneys for all plaintiffs. After numerous documents were produced by both sides concerning the liability aspects of this case, the following exchange took place:

> Mr. FitzSimmons [for all defendants]: Do you have anything at all to produce with respect to item no. 11 calling for the personnel records of the individual plaintiffs?
>
> Mr. Schierberl [for all plaintiffs]: Not at this time. We are obtaining those records and as soon as we have them I will give them to you.
>
> Transcript of Meeting of January 10, 1974 at pp. 120-121.

6. Four days after the document marking session, on January 14, 1974, I received a telephone call from Mr. Ernest Kennedy, a partner in the firm of Mendes & Mount, who requested copies of certain documents which were produced by plaintiffs at the document marking session. A copy of my memo of this telephone conversation is annexed hereto as Exhibit "B".

7. On January 17, 1974 I transmitted, by hand delivery, all of the requested documents to Mr. Kennedy. A copy of my letter of transmittal is annexed hereto as Exhibit "C".

8. On February 5, 1974 Mr. Schierberl transmitted to Mr. FitzSimons the transcript of the document marking session of January 10, 1974. A copy of Mr. Schierberl's letter of transmittal is annexed hereto as Exhibit "D".

9. Between January 15, 1974 and May 28, 1974, Mr. Schierberl wrote several letters to Mr. FitzSimons and I personally made several telephone calls to Mr. FitzSimons' office in which we attempted to schedule further discovery in this matter. All of Mr. Schierberl's letters and all of my telephone calls went unanswered.

10. As a result of defendants' failure to respond to all of our efforts to proceed with discovery, I called this Court on April 24, 1974 and spoke with Judge Carter's Deputy Clerk, Clark McCullough, and suggested that a conference with the Court might aid in the completion of discovery. Judge Carter scheduled a conference for May 28, 1974.

11. At the conference before Judge Carter on May 28, 1974, the Court ordered that all discovery be completed by July 15, 1974 and that trial commence on August 1, 1974.

12. On May 29, 1974 I forwarded to Mr. FitzSimons copies of all documents that were produced on January 10, 1974, copies of which were not previously requested. In my letter of transmittal, I stated:

> The only item remaining outstanding is Exhibit B, which is the 16 millimeter motion picture, taken from the chase plane at the time of the accident. We are endeavoring to have this reproduced for you. We expect this to be accomplished shortly and will forward it to you at such time.

A copy of my letter of transmittal is annexed hereto as Exhibit "E".

13. By letter of May 31, 1974, I advised Mr. FitzSimons that the defective component parts were available for the inspection of his expert. In my letter I stated:

> Further, if there are any other items which we have not yet provided, kindly inform us and we shall endeavor to accommodate you.

A copy of my letter of May 31, 1974 is annexed hereto as Exhibit "F".

14. On June 11, 1974 I forwarded to Mr. FitzSimons what I believed to be "the only outstanding item", the 16 millimeter motion picture. A copy of my letter of transmittal is annexed hereto as Exhibit "G"

15. From the time of Mr. Kennedy's telephone request for copies of documents on January 14, 1974 until the end of June, 1974, not a single communication or request was received from SP's attorneys. On or about June 26, 1974,

I received a telephone call from Mr. Murphy of Mendes & Mount, who requested that the defective parts be delivered to defendants' expert, Dr. Bernard Ross, of Failure Analysis Associates in Palo Alto, California. Additionally, we informally agreed that there would be no other production of documents or answers to interrogatories until after the depositions of the crew were completed in July, at which time defendants would analyze the situation and make further requests if necessary. This informal agreement is set forth in my Affidavit in Opposition to Defendants' Motion to Compel dated October 10, 1974 and is not disputed in defendants' reply affidavit. These affidavits are annexed hereto as Exhibits "H" and "I", respectively.

16. On July 16, 1974 the firm of Fuchsberg & Fuchsberg was substituted for Condon & Forsyth, as attorneys of record for the crew. Thereafter, Condon & Forsyth did not in any way attempt to represent the crew.

17. At defendants' request, the trial of this action was adjourned from August 1, 1974 to October 1, 1974 and, on September 30, 1974 defendants' moved, among other things, to compel the production of the crew's personnel records pursuant to their original notice of July 5, 1973. In my affidavit of October 10, 1974, I opposed defendants' Motion and stated, with specific reference to the crew's personnel files, that

> (3) Upon information and belief the personal counsel for plaintiffs Landau, Muscatel and Koren have transmitted or are in the process of transmitting all personnel records to defendants' counsel. (At page 3 of the Affidavit of Marshall S. Turner, annexed hereto as Exhibit "H").

Affidavit of Marshall S. Turner in Support of Motion

18. In his reply affidavit, sworn to on the 25th day of October, 1974, Mr. Murphy did not mention the production of the crew's personnel records. See Affidavit of Dennis Murphy annexed hereto as Exhibit "I". Mr. Murphy did refer to interrogatories Nos. 57 and 58 which Mr. Murphy indicated related to unemployment, disability compensation and insurance policies and benefits received by the plaintiff crew members. However, in the set of interrogatories, which was served upon Condon & Forsyth, Items 54 through 58 were not included. Apparently this was a typing omission by a secretary at the offices of Mendes & Mount. A copy of defendants' interrogatories is annexed hereto as Exhibit "J".

19. No papers, either in support of or in opposition to defendants' Motion to Compel, were submitted by the firm of Fuchsberg & Fuchsberg, attorneys for plaintiff crew members.

20. On November 15, 1974, this Court denied defendants' Motion for further production of documents and answers to interrogatories. A copy of the Order of the Honorable Robert L. Carter is annexed hereto as Exhibit "K".

21. It is respectfully submitted that the record is clear that plaintiff Israel Aircraft Industries, Ltd. and its attorneys, Condon & Forsyth, made every effort to comply with discovery requests. As this Court indicated on page 13 of its Opinion of October 26, 1976, there was no outstanding Order to Compel Discovery of plaintiffs and, in fact, this Court denied defendants' attempt to obtain such an Order. It is respectfully submitted that this Court erred in finding a deliberate failure to produce. Such a finding

is unsupported by the evidence in the case and the evidence submitted herewith clearly demonstrates the contrary. That is, at all times in this litigation, IAI and its attorneys made every effort to comply with all discovery requests as well as all of this Court's schedules and orders.

Dated: New York, New York
November 13, 1976

Respectfully submitted,

/s/ MARSHALL S. TURNER
Marshall S. Turner

(Sworn to November 13, 1976.)

Exhibit A Annexed to Foregoing Affidavit

Defendants' Notice for Production of Documents, dated July 5, 1973 is printed at pages 58a-60a.

Exhibit B—Annexed to Foregoing Affidavit

(Memorandum dated January 15, 1974)

CONDON & FORSYTH

MEMORANDUM

To File — FROM MST

SUBJECT Israel Air/NAR #5045 — DATE 1/15/74

On January 14, 1974 Ernest Kennedy of Mendes & Mount called requesting that we forward to him the original documents produced on behalf of plaintiffs in the *Israel Aircraft* v. *North American Rockwell* case. He requested Exhibits D, F, H, L, Q, R, X, EE, FF, and GG. I stated to Mr. Kennedy that I would be happy to provide him with photocopies of said Exhibits, however, I declined to furnish him with the originals in the absence of approval from Mr. Schierberl.

Mr. Kennedy indicated that Fitzsimons wants the Exhibits as early as possible and agreed that if we would have reproductions made for him they would be perfectly acceptable to him. I am therefore sending Todd Photo the following Exhibits:

1. Exhibit D—Report of Dr. Cina
2. Exhibit F—Report of Taussig dated March 29, 1971
3. Exhibit H—Report of Taussig dated August 5, 1971
4. Exhibit L—Correspondence file, primarily that of North American Rockwell
5. Exhibit Q—Aero commander–functional description pages 1-16, page 3 missing
6. Exhibit R—Engineering work requests–Aero commander–7 pages

Exhibit B—Memorandum Dated January 15, 1974

7. Exhibit X—British Aircraft Corporation Report No. AL/STRUCT/1371

8. Exhibit EE—IAI Report No. 065/2125B–6 pages

9. Exhibit FF—IAI Report No. 4650/2827 entitled conversion to Model 1123 external conformity–5 pages accompanied by 9 pages of drawing numbers.

10. Exhibit GG—IAI Report No. 4650/2827A comprising 6 pages and 18 pages of drawing numbers.

Exhibit C—Annexed to Foregoing Affidavit

(Letter dated January 17, 1974)

January 17, 1974

DELIVERY BY HAND

Ernest Kennedy, Esq.
Mendes & Mount
27 William Street
New York, New York 10005

Re: Israel Aircraft Industries v.
North American Rockwell Corporation
Our File No. 5054

Dear Mr. Kennedy:

Attached hereto please find a copy of the documents you requested as follows:

1. Exhibit D
2. Exhibit F
3. Exhibit H
4. Exhibit L
5. Exhibit Q
6. Exhibit R
7. Exhibit X
8. Exhibit EE
9. Exhibit FF
10. Exhibit GG

Very truly yours,

CONDON & FORSYTH

By .....
Marshall S. Turner

MST:mef
Enclosures

Exhibit D—Annexed to Foregoing Affidavit

(Letter dated February 5, 1974)

February 5, 1974

James M. FitzSimons, Esq.
Mendes & Mount
27 William Street
New York, New York 10005

Re: Israel Aircraft Industries, Ltd., Zohar Landau, Nira Landau, Mordechai Muscatel, Zila Muscatel, Hagai Koren, and Dalia Koren

v.

Standard Precision A Division Of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation

United States District Court
Southern District of New York

Dear Jim:

We enclose a copy of the transcript of the examination of documents which took place at our office on January 10, 1974.

Sincerely yours,

William L. Schierberl

WLS:dg
Enclosure

Exhibit E—Annexed to Foregoing Affidavit

(Letter dated May 29, 1974)

CONDON & FORSYTH
1251 AVENUE OF THE AMERICAS
NEW YORK, N. Y. 10020

May 29, 1974

James FitzSimons, Esq.
Mendes & Mount
27 William Street
New York, New York 10005

Re: Israel Aircraft Industries, Ltd. et al. v. North American Rockwell Corporation, et al.
United States District Court
Southern District of New York
C & F File No. 5054

Dear Mr. FitzSimons:

We enclose copies of all exhibits which were produced by plaintiffs at the document marking session on January 10, 1974 and have not heretofore been provided to you.

The documents enclosed herewith are as follows:

1. Exhibit C
2. Exhibit J
3. Exhibit K
4. Exhibit M
5. Exhibit N
6. Exhibit O
7. Exhibit P
8. Exhibit S
9. Exhibit T

Exhibit E—Letter Dated May 29, 1974

10. Exhibit U
11. Exhibit V
12. Exhibit W
13. Exhibit Y
14. Exhibit Z
15. Exhibit AA, AA-1, AA-2, AA-3
16. Exhibit BB, BB-1
17. Exhibit CC, CC-1
18. Exhibit DD, DD-1, DD-2, DD-3, DD-4
19. Exhibit HH
20. Exhibit II
21. Exhibit JJ
22. Exhibit KK
23. Exhibit LL
24. Exhibit MM
25. Exhibit NN, NN-1, NN-2, NN-3.

The only item remaining outstanding is Exhibit B, which is the 16 millimeter motion picture, taken from the chase plane at the time of the accident. We are endeavoring to have this reproduced for you. We expect this to be accomplished shortly and will forward it to you at such time.

Should you have difficulty in reading any of the photocopies which we have provided you with, the originals, or our copies, will be available for your inspection upon request.

Very truly yours,

CONDON & FORSYTH

By /s/ MARSHALL S. TURNER
Marshall S. Turner

MST:mef
Enclosures

Exhibit F—Annexed to Foregoing Affidavit

(Letter dated May 31, 1974)

May 31, 1974

James FitzSimons, Esq.
Mendes & Mount
27 William Street
New York, New York 10005

Re: Israel Aircraft Industries, Ltd.
et al. v. North American Rockwell
Corporation, et al.
United States District Court
Southern District of New York
C & F File No. 5054

Dear Mr. FitzSimons:

In addition to the documents already provided for you, there remain the tangible items, which were the subject of the Taussig examinations. For identification purposes the Exhibit letters "G" and "I" were reserved at the document marking session of January 10, 1974.

These parts are available for your inspection at any time at our offices.

Further, if there are any other items which we have not yet provided kindly inform us and we shall endeavor to accommodate you.

Very truly yours,

CONDON & FORSYTH

By .....
Marshall S. Turner

MST:mef

Exhibit G—Annexed to Foregoing Affidavit

(Letter dated June 11, 1974)

June 11, 1974

HAND DELIVERY

James FitzSimons, Esq.
Mendes & Mount
27 William Street
New York, New York 10005

Re: Israel Aircraft Industries, Ltd., et al
v. North American Rockwell Corporation, et al
United States District Court
Southern District of New York
C & F File No. 5054

Dear Mr. FitzSimons:

Please refer to our letter of May 29, 1974, in which we advised that the only outstanding item which was to be reproduced and supplied to you was Exhibit B, the 16 millimeter motion picture, taken from the "chase plane" at the time of the accident.

I am enclosing herewith a reproduction of Exhibit B.

We shall forward, in the near future, our statement for expenses incurred in reproducing plaintiff's exhibits, at your request.

Very truly yours,

CONDON & FORSYTH

By .....
Marshall S. Turner

Enc.
16 m.m.
motion picture

Exhibit H—Annexed to Foregoing Affidavit

Affidavit of Marshall S. Turner in Opposition to Motion to Dismiss, dated October 8, 1974, is printed above at pages 118a-124a.

Exhibit I—Annexed to Foregoing Affidavit

Reply Affidavit of Dennis C. Murphy, dated October 25, 1974 is printed above at pages 125a-130a.

Exhibit J—Annexed to Foregoing Affidavit

Defendants' Interrogatories are printed above at pages 66a-97a.

Exhibit K—Annexed to Foregoing Affidavit

(Memo Endorsed)

11/15/74 Motion denied.

So ordered.

ROBERT L. CARTER
U.S.D.J.

Affidavit of Selvyn Seidel in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN COURT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

SELVYN SEIDEL, being duly sworn, deposes and says:

1. I am a member of Hale Russell Gray Seaman & Birkett, counsel which have requested to be permitted to act as special counsel in this proceeding for Israel Aircraft Industries, Ltd. ("IAI"). I submit this affidavit and the accompanying affidavit of Herzela Ron, General Counsel for IAI, in further support of the motions made on behalf of IAI by Hale Russel Gray Seaman & Birkett by Notice of Motion dated November 5, 1976; in further support of the motions for reconsideration made on behalf of IAI by Condon & Forsyth; and in connection with and in response to the motions for reconsideration made by Fuchsberg and Fuchsberg dated November 5, 1976.

2. It is submitted that the accompanying affidavit of Mrs. Ron, and the affidavit of Mrs. Ron dated November 5, 1976 show, as set forth in more detail in those affidavits, that IAI committed no wrong here because prior to the jury verdict:

(a) IAI did not know counterclaims were asserted against it;

(b) IAI did not intend the releases to release "all the world", but intended them only to release IAI and the Ministry of Defense from direct and indirect claims; and

(c) IAI did not know of any document or other request to produce the crew's "personnel records".

3. Moreover, I and my partner John S. Russell, Jr. have met on three occasions for a total of about nine hours with Messsrs. William L. Schierberl, George N. Tompkins, Jr., Thomas J. Whalen, and Marshall S. Turner, all of Condon & Forsyth, in connection with this Court's finding of fraud. We have also had several telephone conversations with Messrs. Whalen, Tompkins and Turner, and have reviewed documents in IAI's possession relating to the litigation. Although obviously this case is complex and we have not had an opportunity to review it in detail, and although we do not think it appropriate to comment in general here on what was and was not done, in our review we have not learned anything to support claims that the actions or failure to act of Mr. Schierberl, Mr. Turner, or anyone else of Condon & Forsyth, constitutes fraud.

4. On this basis, it is respectfully requested that the motions made on behalf of IAI by our firm and Condon & Forsyth be granted.

/s/ SELVYN SEIDEL
Selvyn Seidel

(Sworn to November 17, 1976.)

Affidavit of Herzela Ron in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

HERZELA RON, being duly sworn, deposes and says:

1. I am General Counsel and Vice President of Israel Aircraft Industries, Ltd. ("IAI"). Following this Court's decision in the above matter, dated October 26, 1976, I investigated the facts relating to that portion of this Court's decision finding that IAI had committed fraud. I have done what I could in this investigation in the limited time available, including speaking at great length by telephone to Mr. Atzmon and Mr. P. Ben Zvi in Israel, and reviewing and causing to be reviewed documents in IAI's possession.

2. Based on this investigation and to the best of my knowledge and belief, I can testify to the following facts, set forth in further detail below, which establish that IAI has not committed any fraud or any other wrongdoing in this litigation:

(a) Until after the jury verdict, IAI never knew that IAI had any obligation or reason to produce the releases, referred to in this Court's decision, because:

(i) IAI was not aware that counterclaims had been asserted against it in this litigation;

(ii) it never occurred to IAI, and it was not IAI's intent, that the releases might release or be interpreted to release someone other than "IAI and/or the Ministry of Defense and/or any other person or legal body in their name and/or in their stead."

(b) Until after the jury verdict, IAI was never asked, by anyone in this litigation, in writing or orally, whether any releases existed concerning the payments made by IAI to the crew and was never asked by anybody to produce such agreements or releases or "personnel records" (which contained the releases) referred to in this Court's decision.

(c) If it had occurred to IAI that it had any obligation to produce the releases, or the employee agreements, or the "personnel records"—or if IAI had been merely requested to produce these documents and/or any information with relation thereto — IAI would without question have produced all information and documents called for, as it has undisputably done diligently and faithfully throughout the litigation.

A. *IAI Did Not Know of the Counterclaims*

3. Until after the jury verdict, IAI was not aware and did not suspect that there were any counterclaims asserted against it in the lawsuit, or that it had any obligation with respect to such counterclaims whether with respect to the disclosure of the "releases" or otherwise.

4. To understand how IAI could have thus been in the dark, it is important to know the following facts.

(a) IAI was not a party to the claim brought by the crew members and has become a party to it as a defendant

only by virtue of the counterclaims incorporated in defendants' answers. These answers, including the counterclaims and the Notice to Produce, were served on Condon & Forsyth on July 5, 1973. On July 24, 1973, a reply to the counterclaims containing general denials was served by Condon & Forsyth, but without knowledge of or consultation with IAI.

(b) At the time, IAI did not receive a copy of the counterclaims or reply, nor was it ever advised of them. It was not until one and one half years later—and then only when, on October 29, 1974, Mr. Atzmon, Director of Insurance and Claims of IAI, (who was making preparations to visit the United States at the time of the anticipated trial) requested by telex that Condon & Forsyth furnish the "updated pleadings, the amended complaint and answer for the completion of our files"—that the "answers" were forwarded without explanation. By cover letter dated October 29, 1974, Condon & Forsyth sent Mr. Atzmon a copy of the "Amended Complaint and defendants' answers for completion of your files" without any further comment or indication drawing Mr. Atzmon's attention to the fact that the answers incorporated counterclaims or informing him of the significance of such counterclaims. No copy of Condon & Forsyth's reply to the counterclaims was sent then, or prior to the court decision, to IAI nor was IAI advised of it. Mr. Atzmon's requesting telex, and Condon & Forsyth's covering letter response, are annexed hereto as Exhibit 1.

(c) Accordingly, Mr. Atzmon, not having been advised that the "answer" included a counterclaim, nor of the significance of a counterclaim, routinely sent the amended complaint and answer to files never realizing that the final short paragraph of the answers contained a counterclaim.

5. Had the counterclaim against IAI been brought to IAI's attention and IAI's obligations with respect thereto explained, there is no doubt in my mind that IAI would have informed Condon & Forsyth of the affirmative defenses it had against such counterclaims, including the releases. In fact, it would of course have been in the interest of IAI that such releases would be disclosed and pleaded in the reply to the counterclaim.

B. *IAI Always Intended and Understood the "Releases" to Release Only IAI and the Ministry of Defense and to Bar Any Direct or Indirect Claims Against Them*

6. When the releases were entered into, in 1970 and 1971, long before this lawsuit began, it was IAI's intention and purpose that they fully release IAI and the Ministry of Defense, and bar any claims, direct or indirect, against IAI or the Ministry of Defense. To the best of my knowledge and belief, obtaining such releases was consistent with IAI's standard policy to have its employees sign releases wherever payments were made by IAI whether ex-gratia or under settlement. These releases explicitly prohibited not only direct claims but also indirect claims against IAI and the ministry of Defense, that is, all "claims against IAI and/or the Ministry of Defense and/or any one of them and/or any other person, and/or legal entity in their name and/or in their stead". I have spoken with the principal lawyer involved, Mr. Ben Zvi, whose signature appears under the releases of both Landau and Muscatel, and Mr. Ben Zvi has also spoken with Mrs. Sadeh, whose signature appears under the release of Koren. Mr. Ben Zvi has confirmed to me that it was fully explained by himself and Mrs. Sadeh to the said crew members at the time they signed the releases that the releases were intended to

bar all claims against IAI or the Ministry of Defense, whether brought by the crew directly against IAI or the Ministry of Defense, or indirectly through third parties.*

7. There was, however, no intent or interest on the part of IAI to have the crew release claims against third parties which did not involve IAI or the Ministry of Defense. This was particularly so because IAI believed it could in no way be liable in connection with such claims because:

(a) IAI's action in the entire matter had been thoroughly investigated by the Investigation Committee appointed by the Minister of Transport of the State of Israel and the findings of the Committee, which were released prior to the signature of the releases and are contained in a report admissible under Israeli law in an Israeli Court, supported IAI's belief that IAI was not responsible for the accident.

(b) In IAI's opinion the language of the releases—stating the crew members "nor any legal entity in my name and/or in my stead" could not sue "IAI and/or the Ministry of Defense and/or any one of them and/or any person, and/or legal entity in their name and/or *in their stead*" (emphasis added), protected IAI and the Ministry of Defense from any claims whether asserted by the crew directly against them or indirectly through third parties who had claims asserted against them by the crew and, in turn, sought contribution or indemnity from IAI or the Ministry of Defense.

---

* A telex from Mr. Ben Zvi is annexed as Exhibit 2. As reflected in the telex, at the time the releases were executed and in response to questions by the crew members Mr. Ben Zvi and Mrs. Sadeh explained also that the releases released only claims against IAI and the Ministry of Defense.

8. If IAI had any intent concerning independent claims by the crew against third parties, the facts show that IAI did not oppose such claims. IAI, in response to suggestions of the insurers, cooperated in having the crew members join as plaintiffs in the instant litigation. IAI would have objected to any such joinder and would have refused to provide any assistance in this respect if it ever suspected the releases may have released all third parties.

9. Had IAI intended to obtain from the crew a release which releases the "whole world", it would have been a simple matter to so provide. Paragraphs 3 and 4 of the releases of both Muscatel and Landau, containing the "releases" and the "covenants not to sue", could simply have provided a release to and a covenant not to sue IAI, or the Ministry of Defense, or any other person whatsoever. Instead IAI took careful pains to limit these paragraphs to, specifically, claims against "IAI, and/or the Ministry of Defense and/or one of them and/or any person, and/or any legal entity in their name and/or *in their stead*", only* (emphasis added).

10. Until IAI learned of Dr. Herman's legal opinion, prepared after the jury verdict and at the request of Condon & Forsyth, it never occurred to IAI that said releases may be interpreted as general releases releasing the whole world. In fact, I was quite surprised to learn from Dr. Herman at that time that there may be such a legal interpretation. Indeed, I seriously questioned Dr. Herman's

---

* While the release of Koren did not contain this specific limitation, to my knowledge and belief it was verified by Mrs. Sadeh, whose signature appears on the release and indicates that Mrs. Sadeh explained to Mr. Koren that his release was intended to have this same limited effect. See Exhibit 2 hereto.

view. But the critical fact in connection with this Court's finding of fraud remains that IAI—rightly or wrongly*—at all relevant times intended and believed in good faith that the releases only barred claims against IAI, against the Ministry of Defense, and against someone else in the stead of IAI or the Ministry of Defense.**

C. *Prior to This Court's October 26 Decision, IAI Never Knew of the Request to Produce the Crew's "Personnel Records"*

11. Until IAI received a copy of this Court's October 26, 1976 decision, IAI never received a copy or was aware of the Notice to Produce, dated July 5, 1973, calling for the production under item 11 of the crew's "personnel records". Nor did IAI receive a copy or was it advised of the Motion to Compel Production submitted by Mendes & Mount on June 12, 1974, which seeks to compel production of all documents supposedly not previously produced, including, under item 3 thereof, all "personnel records of

---

* Admittedly, IAI's legal personnel, including myself, are essentially corporate and not tort lawyers and are not experts on tort releases. Also the law relating to this area is involved and apparently subject to differences of view as evidenced by the lengthy and differing opinions of Dr. Herman, Mr. Abramson and Mr. Beinisch.

** There is an ambiguous statement on pages 11 and 12 of Mr. Cousins' November 5, 1975 affidavit indicating that right after the jury verdict, Mr. Atzmon supposedly told "Landau or Koren", who were at the time attending the trial in New York, that "the crew members may have signed some kind of Release". However, Mr. Atzmon has verified to me that he was not in New York at the time when Mr. Cousins indicates that the conversation took place, since he had returned to Israel about two weeks before. Moreover, he has also confirmed to me that he had no telephone conversations or other communications concerning the releases with Landau or Koren during this time.

the individual plaintiffs" which were required to be produced under said item 11 of the Notice to Produce. Nor did IAI receive or become aware of a copy of this Court's order denying that motion dated November 15, 1974.

12. Hence, prior to this Court's decision, IAI was unaware of the existence of the request to produce the personnel records. In fact, IAI was never asked—not by Fuchsberg & Fuchsberg, not by Mendes & Mount, not by Condon & Forsyth, and not by anyone else—whether any agreements at all were entered into between IAI and the individual plaintiffs pertaining to the payments made by IAI to the crew.

13. The only question IAI was ever aware of relating to payments to the crew were contained in an informal background questionnaire from Condon & Forsyth's corresponding London counsel and were received as part of a preliminary information-gathering inquiry.* This questionnaire was directed to the crew and transmitted to them by Mr. Atzmon, and was answered by the crew, with the requested assistance of Mr. Atzmon. The questionnaire and the answers thereto were given to London counsel prior to the time the complaint was served. In response to the questionnaire, all the payments to the crew were

---

* I am informed by Hale Russell Gray Seaman & Birkett that this "questionnaire" was erroneously described to this Court as "interrogatories". I am informed that the responses to the questionnaire were subsequently produced by Condon & Forsyth in connection with discovery. But they were never intended to serve as anything more than pre-litigation preliminary background information for the underwriters. Indeed, prior to this Court's decision and to my best knowledge and belief, IAI never received the crew's deposition transcripts and was never even aware that the questionnaire answers were produced as stated above.

disclosed and payments made by IAI were referred to as "ex-gratia" payments. Apart from this informal preliminary pre-litigation inquiry, IAI never received any other questions and/or requests for clarification concerning these payments.

14. Parties have recently pointed to the description of these payments as "ex-gratia" as somehow intended to mislead defendants into thinking the payments constituted workmen's compensation. Nothing could be further from the truth. Although I have not had the opportunity to explore the aspects of workmen's compensation law in the United States, I do not understand how it can be claimed that this description of these payments as "ex-gratia" could have been intended to mislead anyone into concluding that the payments were workmen's compensation. Indeed, the description of these payments as "ex-gratia" conformed to what IAI—and the crew—considered to be an accurate description of what these payments were, in that the payments were made on the conviction of IAI that IAI had no liability as to the accident. This belief was reinforced prior to such description by the independent findings of the Investigation Committee referred to in paragraph 9(a) above.

15. In fact, prior to the jury verdict, we were never aware that the releases had not been disclosed by the crew. Indeed, it is surprising that defendants' counsel, at depositions or otherwise, failed to explore the background relating to the ex-gratia payments, or at least inquire whether there were any related written agreements.

16. Had IAI been aware at any time prior to the jury verdict of the Notice to Produce the "personnel records",

IAI would without doubt have promptly submitted the "personnel files"—as it has fully complied with all other requests for documents and information submitted by Condon & Forsyth. These files contained the releases,* and to the best of my knowledge and belief, the releases were always contained in those files and were placed there in accordance with standard filing practices followed by IAI.

D. *Conclusion*

17. The above facts would have been furnished to this Court in connection with the post-trial motions, had IAI been apprised of the fact that these motions were made raising allegations of fraud on the part of IAI.**

18. The basis of any finding of fraud has to involve the element of intent, which in turn requires knowledge. But as shown above, there was no knowledge on IAI's part of any counter-claims, or of any Notice to Produce, or of any other factors giving rise to an obligation to produce the releases. Therefore, there was not and could not be any culpable action or omission on the part of IAI in this action.

/s/ HERZELA RON
Herzela Ron

(Sworn to November 17, 1976.)

---

* This was confirmed to me during this past week in response to my telephone request to Mr. Ben Zvi in Israel, who verified to me that he personally checked these files.

** As stated in paragraph 2 of my earlier affidavit to this Court dated November 5, 1976, to the best of my knowledge and belief, IAI was not informed of this fact prior to this Court's decision.

Exhibit 1—Annexed to Foregoing Affidavit

(Telegram dated October 28, 1974)

933

MENDES FOR SCHIERBERL

T-21896 28.10.74

1. THANK YOU FOR DEPOSITIONS RCVD BLUMKIN, JACOBI, SUTTON AND CINA. I PASSED THEM ON. THE OTHERS NOT YET RCVD. WHEN WILL THEY ARRIVE?

2. COULD YOU PLS SEND UPDATED PLEADINGS, AMENDED COMPLAINT AND ANSWER FOR COMPLETION OF OUR FILE.

3. WHAT IS PRESENT TRIAL DATE, WHEN SHOULD FIRST WITTNESSES ARRIVE IN N Y AND WHO ARE THEY?

4. WHAT ABOUT MYSELF. WHEN DO YOU EXPECT ME?

REGARDS

ATSMON

Exhibit 1—Continued

(Letter dated October 29, 1974)

CONDON & FORSYTH
1251 AVENUE OF THE AMERICAS
NEW YORK, N. Y. 10020

October 29, 1974

Y. Atsmon, Esquire
Director of Insurance
Israel Aircraft Industries, Ltd.
Lod Airport
Israel

RE: Israel Aircraft Industries, Ltd., Zohar Landau, Nira Landau, Mordechai Muscatel, Zila Muscatel, Hagai Koren, and Dalia Koren,

—v—

Standard Precision A Division Of Electronic Communications, Inc., Electronic Communications, Inc., The National Cash Register Company, and North American Rockwell Corporation
United States District Court
Southern District of New York

Dear Mr. Atsmon:

As requested in your telex of October 28, 1974, we enclose a copy of the Amended Complaint and defendants' Answers for completion of your file.

Sincerely yours,

/s/ WILLIAM L. SCHIERBERL
William L. Schierberl

WLS:dg
Enclosures

Exhibit 2—Annexed to Foregoing Affidavit

(Telex from Ben Zvi)

ATTN MENDES PLS REMIT TO MRS H RON

QUOTE

T-30433 17.11.76

RE IAI V.S.P.

WITH RESPECT TO THE DEEDS OF RELEASE SIGNED BY IAI'S EMPLOYEES, Z LANDAU, M. MUSCATEL AND H. KOREN, UPON THEIR BEING PAID BY IAI THE RESPECTIVE AMOUNTS IN CONNECTION WITH THE AIRCRAFT ACCIDENT WHICH OCCURRED ON 21.1.70 I WISH TO STATE THE FOLLOWING:

1. MR LANDAU AND MR MUSCATEL, WHO SIGNED THE DEEDS IN MY PRESENCE, WERE ADVISED BY ME AS TO THE CONTENTS OF SAID DEEDS AND MRS. N SADEH, CONFIRMED TO ME THAT SHE HAD ADVISED MR KOREN, WHO SIGNED HIS DEED IN HER PRESENCE. AS TO THE CONTENTS OF SAME.

2. BOTH MRS. SADEH AND I ADVISED THE EMPLOYEES THAT THE DEEDS CONSTITUTE A FINAL AND COMPLETE RELEASE OF ANY CLAIMS AND DEMANDS THEY HAD, OR MIGHT HAVE, AGAINST IAI AND MOD, AS WELL AS AN OBSOLUTE UNDERTAKING ON THEIR PART NOT TO SUE IAI AND/OR MOD EITHER DIRECTLY OR INDIRECTLY (THROUGH A THIRD PARTY) WITH RESPECT TO AND/OR IN CONNECTION WITH THE

Exhibit 2—Telex from Ben Zvi

ACCIDENT. IT WAS MADE QUITE CLEAR TO THEM THAT THEY WERE NOT PROHIBITED FROM PROCEEDING AGAINST ANY THIRD PARTIES WITH REGARD TO THE ACCIDENT, SUBJECT, OF COURSE, TO THE LIMITATION THAT SUCH CLAIMS AGAINST THIRD PARTIES WOULD NOT IN ANY WAY SUBJECT IAI OR MOD TO ANY LIABILITY (E.G., THAT SUCH THIRD PART WOULD DEMAND IAI TO REIMBURSE HIM FOR SUCH CLAIM)

3. BOTH N SADEH AND I UNDERSTOOD, AT THE TIME THE DEEDS WERE SIGNED, THAT THE ABOVE WAS THE MEANING OF THE RELEASE AND IT DID NOT OCCUR TO US AT THE TIME THAT THE DEEDS MAY BE INTERPRETED AS A GENERAL RELEASE TO ANY THIRD PARTIES.

4. PLS NOTE THAT THE DEEDS SIGNED IN MY PRESENCE BY MR LANDAU AND MR MUSCATEL CONTAIN IN PARA. 3 AND PARA 4. SPECIFICALLY A LIMITATION OF THE RELEASE, AND THE UNDERTAKING NOT TO SUE CONTAINED THEREIN TO "IAI AND/OR M.O.D. AND/OR ANY PERSON OR LEGAL BODY IN THEIR NAME AND/OR IN THEIR SEADGEEBBBTTTOOOOOMMMOOO

4. PLS NOTE THAT THE DEEDS SIGNED IN MY PRESENCE BY MR LANDAU AND MR MUSCATEL CONTAIN IN PARA. 3 AND PARA 4. SPECIFICALLY A LIMITATION OF THE RELEASE, AND THE UNDERTAKING NOT TO SUE CONTAINED THEREIN TO "IAI AND/OR M.O.D. AND/OR ANY PERSON

Exhibit 2—Telex from Ben Zvi

OR LEGAL BODY IN THEIR NAME AND/OR IN THEIR STEAD", ONLY

REGARDS,

P BENZVI

UNQUOTE

RETYPED FROM LIGHT ORIGINAL (NOT XEROXABLE) ORIGINAL FILED WITH THE COURT

Affidavit of Norman Leonard Cousins in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

NORMAN LEONARD COUSINS, ESQ., being duly sworn, deposes and says:

I am an attorney with the firm of Fuchsberg & Fuchsberg, attorneys for plaintiffs Landau, Muscatel and Koren herein. I am admitted to practice in all the courts of the State of New York; the United States District Courts for the Southern and Eastern Districts of New York; the United States Court of Appeals for the Second Circuit and the United States Supreme Court.

I respectfully submit this affidavit in support of the crew members' motion pursuant to Rule 9(m) of the Rules of the Southern District of New York and Rule 60(b) of the Federal Rules of Civil Procedure for an order granting renewal, reargument and reconsideration of this Court's opinion of October 26, 1976 and upon such renewal, reargument and reconsideration withdrawing or modifying said opinion to the extent of reinstating the complaints of the crew members Landau, Muscatel and Koren and the verdict of the jury obtained thereon.

It is evident from a reading of the affidavit of Herzela Ron sworn to the 17th day of November, 1976 that none of

the crew members ever signed any general releases or any documents intending to be general releases. I think it has also now been well established that while there may have been something less than ideal communications between Israel Aircraft and its attorneys, Condon and Forsyth, that there has been no fraud perpetrated anywhere by anyone in this case, least of all the crew members or their attorneys. Not only have they and their attorneys put the factual matters of this case in context through their affidavits, but they have been completely backed up as to what they said through the affidavit of Herzela Ron on behalf of Israel Aircraft.

Hopefully, the Court will now put aside any belief it had of a fraud having been perpetrated in this case and reconsider the matters now before it on their merits.

If the deeds now before this Court are not general releases, what are they and what legal effect should be given to them?

Paragraph 4 of Zohar Landau's deed is a "hold harmless" clause. It obligates Zohar Landau to indemnify IAI up to the extent of the 75,000 Israeli Pounds paid him by IAI against any demands made for that money by, "any person and/or any legal entity in my name and/or in my stead".

Paragraph 4 as well as the entire deed was drafted by IAI. It does not evidence the clearest of draftsmanship.

Literally read and interpreted, it has no application to the case at bar because the counterclaim asserted against IAI by Standard Precision is not being done in Zohar Landau's name or in his stead. It is not a claim asserted through subrogation, assignment or transfer. At the same time, if Standard Precision was not required to pay any

money to Zohar Landau as a result of the jury's verdict in this case, it would have no counterclaim to assert against IAI. Arguably then, paragraph 4 of Landau's deed to IAI might be deemed to require him to indemnify IAI against Standard Precision's counterclaim But Only to the Extent of the $75,000 Israeli Pounds paid Landau by IAI. Paragraph 4 distinctly says that, "I undertake to indemnify the recipient of the claim on demand, should a claim be made against him by any person or body for any payment borne by him due to the above accident, *up to the amount of IL 75,000*". At most, this clause obligates Zohar Landau to indemnify IAI only up to the sum of IL 75,000. There is nothing in that agreement which IAI can use to defeat Standard Precision's counterclaim against it in whole or in part.

If the deeds are not general releases (and it is clear now that they are not and were never intended by anyone to be), then they cannot be raised by the defendants as a bar to the crew members' claims.

The Court on page 11 of its opinion of October 26, 1976 stated that, "plaintiff crew members chose to bring this suit without mentioning the releases . . .". It needs to be borne in mind that there was no context in which the crew members should plead these "releases". No counterclaim was being asserted against them and they were certainly not required to plead anything in their complaint as to them. Moreover, as has now been unquestionably demonstrated, they were not general releases to begin with. The crew members testified regarding the payments and agreements they had with IAI in accordance with the understanding they had and the information they had been given by IAI and its attorneys. IAI now verifies that they gave the crew members that information. At no time did the defendants

inquire if the agreements were in writing or if they could have copies of any written agreements. Had they so inquired, I am sure IAI would have furnished them.

Should IAI be permitted to interpose these deeds to defeat Standard Precision's counterclaim? I think the answer here has to be, "no".

Unlike the crew members, IAI had a duty to plead these deeds affirmatively in its reply to the defendants' counterclaim. That it failed to do so is explained on page 3 of Miss Ron's affidavit. At best, that explanation that Condon and Forsyth did not advise IAI of the significance of the defendants' counterclaim, evidences a breakdown in communication commonly called "law office failure" which is rarely accepted by the Court as an excuse for failing to do something which should have been done. Moreover, there is nothing in the deeds which purport to protect IAI from claims of any third person not suing in Landau's name and/or stead. At best, the deeds require Landau to indemnify IAI against claims of third parties only up to the extent of IL75,000. There is no way that those deeds, even on their merits, can be deemed to deprive Standard Precision of 65% of its contribution from IAI for the serious injuries these crew members sustained.

The restoration of the complaints herein and the jury's verdict thereon and the denial of IAI's motion to amend its reply to the defendants' counterclaim is more than adequate "punishment" for IAI's five year delay in bringing these deeds to light.

Paragraph 4 of Mordechai Muscatel's deed varies somewhat from the language appearing in Zohar Landau's. Unlike Zohar Landau's, the deed drafted by IAI for Mordechai Muscatel does not obligate Mr. Muscatel to indemnify

IAI to the extent of the 10,000 Israeli Pounds paid him by IAI. It only recites that,

> "I hereby declare and confirm that: neither I nor any person and/or any legal entity *in my name* and/or *in my stead,* have and will have any demands, contentions or claims against IAI and/or the Ministry of Defense . . .".

Here again, Standard Precision's counterclaim against IAI for 65% of the damages Standard Precision must pay Mordechai Muscatel is not being prosecuted in Muscatel's name or stead and is not pursuant to any assignment, transfer or subrogation. No fair interpretation thereof can make it applicable as a defense to Standard Precision's counterclaims.

Paragraph 4 of Hagai Koren's deed varies slightly from that of Muscatel's and Landau's. While more favorable to IAI than either Muscatel's or Landau's, it must be read in light of the date upon which it was executed, July 3, 1970. At that time, when Hagai Koren certified that, "no other person or legal body has got any claim or demand whatsoever in respect of the said accident", that statement was true. No lawsuit had been started and, obviously no counterclaim was then in existence. Moreover, Miss Ron states on page 6 of her affidavit that the deed drafted by IAI for Mr. Koren was intended to have the same effect as that drafted for Muscatel and Landau. That would mean that the most that could be expected from Mr. Landau would be that he would have to indemnify IAI against claims from third persons to the extent of the 5,000 Israeli Pounds he received from IAI.

It is evident that back in 1970 when these deeds were drafted by IAI for the crew members to sign, IAI never

envisioned that it would someday be responsible for 65% of the loss of 029 and the injuries to its crew. Because of that fact it is equally unlikely that IAI ever drafted or expected these deeds would protect it from the claims of third persons in a subsequent lawsuit. Had that been envisioned at the time IAI, whose corporate attorneys drafted these releases, prepared them, it would have inserted a provision that any recoveries of the crew members against third persons would have to be reduced to the extent of any successful counterclaims by third persons against IAI. That would have prevented the crew members from receiving full recovery from third persons and would never have been signed by the crew members. This is made patently clear in paragraphs 7 and 8 of Miss Ron's affidavit.

It is possible that poor communication between Condon and Forsyth and IAI resulted in its failure to plead the deeds of release as affirmative defenses to Standard Precision's counterclaims. It is more likely, however, that they were not pleaded because neither IAI nor its attorneys ever seriously regarded these deeds as a bar to a third party claim. At best, the deeds only require the crew members to indemnify IAI to the extent of the payments made to the crew members by IAI. The post-trial motion by IAI's attorneys to amend its reply to assert these deeds of release as a complete bar to Standard Precision's counterclaim was probably only thought of for the first time and devised by IAI's attorneys after the disappointing verdict of the jury on liability was delivered in January 1976.

Whatever failings, omissions or strategy there may have been between IAI and its attorneys, the crew members were never parties thereto and should not be affected thereby. The denial of IAI's post trial motion to amend its reply should be sufficient rebuke for its conduct in this case.

Affidavit of Norman Leonard Cousins in Support of Motion

WHEREFORE, it is respectfully requested that the opinion of this Court dated October 26, 1976 be vacated and that the complaint herein together with the verdicts thereon be reinstated in their entirety.

/s/ NORMAN L. COUSINS
Norman Leonard Cousins

(Sworn to November 18, 1976.)

Attachment to Foregoing Affidavit

NYLJ, Nov. 17, 1976, p. 12, col. 4, App. Div., 2nd Dept.

MURRAY, ap. v. CITY OF NEW YORK, res—In a negligence action to recover damages for wrongful death, etc., plaintiff appeals, as limited by her brief, from so much of a judgment of the Supreme Court, Kings County, entered May 1, 1975 as, after a jury trial, dismissed the complaint against the defendant City of New York upon the trial court's granting of said defendant's motion to set aside the verdict on the ground that plaintiff's exclusive remedy was under the Workmen's Compensation Law.

Judgment reversed in so far as appealed from, with costs, jury verdict in favor of plaintiff and against the defendant City of New York reinstated, and action remanded to Trial Term for entry of an appropriate amended judgment.

Plaintiff's decedent, while a pedestrian on a public sidewalk in Brooklyn, was struck and killed as the result of a collision between a police car driven by an officer of the Police Department of the City of New York, responding to a radio call, and a private vehicle. At the time of his death, decedent was employed by the City of New York as a planner with the Economic Development Administration, with offices at 225 Broadway, Manhattan. He had been directed by his superior to make a survey of the Red Hook section of Brooklyn to determine the proper location for a container port. His job was to determine the vacancy rate and condition of buildings in the area.

The defendant city did not assert the defense of the exclusivity of the workmen's compensation remedy (see Workmen's Compensation Law, sections 11, 29, subd. 6) in its answer, and it did not move to amend its answer prior to the trial. It was only after plaintiff had called her wit-

nesses at the trial that the city moved to amend the answer in that regard. The trial court reserved decision. After the jury returned a verdict in favor of plaintiff and against all defendants, the trial court granted a motion by the city to conform the pleadings to the proof and held that the exclusive remedy of workmen's compensation barred plaintiff's commonlaw negligence action.

In our view the trial court improvidently granted the city's motion to conform the pleadings to the proof at the late stage at which the workmen's compensation defense was first interposed. Such a plea is one based on collateral facts showing that the action could not be maintained and must be pleaded affirmatively to permit adequate ventilation of the issues at the trial (*Massi* v. *Alben Bldrs.*, 270 App. Div. 482, 486; *Newland* v. *Goelz*, 35 Misc. 2d 29; *Brecher* v. *Brecher*, 34 A.D. 2d 671, revd. on other grounds 27 N.Y. 2d 986; *Dransfield* v. *Eastern Seaboard Warehouse Corp.*, 43 A.D. 2d 569).

Affidavit of William L. Schierberl in Support of Motion

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

WILLIAM L. SCHIERBERL, being duly sworn, deposes and says, that:

1. I am an attorney admitted to practice before the bar of this Court and the Courts of the State of New York. I am a member of the firm of Condon & Forsyth, attorneys for plaintiff Israel Aircraft Industries, Ltd. in this action. As such, I am fully familiar with all of the facts and proceedings heretofore had herein.

2. I make this further affidavit in support of the Motion for Reargument of plaintiff Israel Aircraft Industries, Ltd. (hereinafter IAI) and in reply to the affidavit of Norman Leonard Cousins, Esq., sworn to on November 5, 1976 filed in support of the Motion for Reargument on behalf of the plaintiff crew members (hereinafter Cousins affidavit).

3. This affidavit is necessary because Mr. Cousins, in his affidavit, has made serious misstatements which must be corrected and suggestions of misconduct on the part of IAI and Condon & Forsyth which must be denied.

4. Mr. Cousins, at page 6 of his affidavit, mistakenly refers, as did the Court, to "answers to the interrogatories propounded by the defendants." See also, Opinion of the Court, p. 9. As stated at page 17 in the Memorandum of Law submitted in support of plaintiff IAI's motion for reargument, the questions and answers referred to in the Cousins affidavit were not interrogatories propounded by defendant Standard Precision. Rather, they were requests for information by John L. Brooks, Esq., my firm's corresponding counsel in London, to the crew members through IAI for details of the personal injury claims. The list of questions and answers of the crew are annexed hereto as Exhibit "A".

5. The information contained in these information answers was furnished by me to both Mendes & Mount and Mr. Cousins' firm, prior to the depositions of the crew in July of 1974. This information was consistent with the information provided to Mr. Cousins by the crew members as stated in his affidavit at page 5. Thus, there was ample opportunity for counsel to all parties to inquire into the matter of the payments and to request copies of all agreements at the depositions of the crew.

6. Although I do not have any recollection of discussing with Mr. Cousins at the time of the crew depositions the matter of payments made to the crew as stated by Mr. Cousins at page 6 of his affidavit, there is nothing inconsistent with what Mr. Cousins states I told him and the belief which I maintained until after the trial. My belief was that the payments made to the crew were in the nature of Workmen's Compensation and would be repaid in the event of recovery against the defendants.

7. Mr. Cousins states, at page 12 of his affidavit of November 5, 1976, that following the verdict on liability, I told him that neither IAI nor I had any general or other type of release and knew nothing of any release document or agreement other than that the crew members had to repay IAI the compensation received from them. This is not accurate. I told Mr. Cousins that I did not know of any such agreement but that I would inquire. As stated in paragraph 4 of my affidavit of November 5, 1976, which is before the Court on this motion, I telexed IAI to inquire as to the existence of any written agreement between IAI and the crew members. The original of this telex accompanies my affidavit of November 5, 1976, and is the best evidence as to the state of my knowledge at the time.

8. I have no information whatever, and I do not believe, that IAI committed any fraud or deceit as stated at page 11 of the Cousins affidavit. I am convinced that IAI never withheld any information or document which they believed or had reason to believe was relevant to this litigation.

9. I believe, based upon the face of the documents themselves, that the "Deeds of Release in Full and Final Accord" were explained by IAI's Israeli counsel, to the crew members. I believe this because it is apparent that each Release was tailored to preserve certain individual interests unique to each crew member. This is evidenced by the section stricken and the provisions added with respect to each individual crew member, as appears on the face thereof. The Court is respectfully referred to paragraph 5 of the Release of Landau, paragraphs 5 and 6 of the Release of Muscatel, and paragraph 5 of the Release of

Koren, translations of which are annexed hereto as Exhibits "B", "C", and "D", respectively.

Dated: New York, New York
November 19, 1976

/s/ William L. Schierberl
William L. Schierberl

(Sworn to November 19, 1976.)

Exhibit A Annexed to Foregoing Affidavit

(Questionnaire Submitted to Crew Members)

Israel Aircraft Industries Limited
Re: Accident to Jet Commander 029
on January 29, 1970

List of questions relating to Mr. Zohar Landau and Mr. Mordecai Muscatell

1. Full names and addresses with ages at date of accident.

2. Qualifications including any licences (pilot or engineer).

3. Original date of employment with IAI.

4. Salary at date of accident.

5. Present position with IAI.

6. Salary at the present time.

7. The date when each of them returned to employment with IAI following the accident.

8. Whether they were in hospital for any part of the period following the accident and if so which hospital, with details of any convalescence.

9. Copies of medical reports relating to their injuries.

10. Copies of any documentary evidence relating to the assessment of their respective disability.

Quesionnaire Submitted to Crew Members

11. Details of any injury insurance payments under the State scheme (interim and final payments).

12. Details of any injury payments made by IAI.

13. Whether or not any of the above-mentioned payments are taken into account and deducted from damages under Israeli law.

14. Brief statements of their recollection of what occurred following their emergency exit from the aircraft. Do they agree with the statements in paragraphs 11 (f) to (k) of the Ministry of Transport Accident Report?

15. Any special information which they wish to add concerning their disability and the effect on their employment and social activities.

JLB
13th September, 72

Response of Zohar Landau to Questionnaire

Re: *Accident to Jet Commander 029 on 21.1.70*

ZOHAR LANDAU

1. Zohar Landau, 12 Tel-Alim St., Ramat-Gan, Israel (P. 52586) Date of Birth: 12.7.1934

2. Qualifications: At date of accident, Pilot Flight Test Engineer—(B.Sc. Aerospace Engineering).
   At present time (October 1972)—Engineer in Engineering Flight Test Department not qualified to take part in test flights. Holder of a revalidated Airline Transport Pilot Licence (A.T.R.) with restrictions.

3. Original date of employment with IAI—15th June 1969

*4. Salary at date of accident—IL 1120

5. Present position with IAI—Engineer in Engineering Flight Test Dept.

*6. Salary at the present time (October 1972)—IL 1580

7. See Item 8 below

8. Hospitalization from 21st January 1970 to 17th April 1970, at Shiba (Tel-Hashomer) Hospital. Returned to half days work on 5th June 1970 to 15th July 1970 (this period includes 10 days at home after removal of second cast). On 15th July 1970, returned to full days work. On August 1970 received one week convalescence period.

---

* Salary does not include payment for overtime. It should be noted that social benefits in Israel are very high and amount to 40%-45% of the salary.

Response of Zohar Landau to Questionnaire

9. Copies of medical reports, documents 1-3 attached.

10. Copies of the disability assessment made by the medical board of the National Health Institute are attached. (Document 4).

11. Interim payment (temporary disability—IL 2068.75). Permanent disability—pension of IL 361.20 per month.

12. Injury payment and reparation for loss of future income of the amount of IL 7,500 were made by IAI.

13. The capitalised value of the pension is taken into account under Israeli Law. The payment made by IAI is not a subject to law as it was an ex gratia payment; it was agreed that in case the present action succeeds, it will be refunded to IAI out of the proceeds.

14. The portion, relating to me, of Para. 11(f) to (k) of the Ministry of Transport Accident Report is correct.

15. As a result of my disability, I am not allowed by both medical boards of the Israel Defense Force Air Force and the Israel Civil Aviation Administration (C.A.A.) to take part in flights requiring the carriage of parachutes. Furthermore, in order to add a Type Rating of any airplane into my licence, I have to demonstrate in flight to authorized representatives of the CAA (a licencing officer and a physician) my ability to operate the a/c controls without limitations. (Document 5).

The major effect of my injury is the impossibility of being a test pilot—as was agreed at the time with IAI's chief test pilot—the late Mr. A. Hacohen (see attached Document 6).

The accident, therefore, precluded me from receiving the benefits of the voluntary termination of my employ-

ment as an airline captain with "ARKIA—Israel Inland Airlines Ltd." and my studies abroad.

As for the effect on my social activities, the disability constitutes a severe restriction of sport activities, dancing, hiking, etc. It restricts me in certain games with my children and several types of home and outdoors activities.

As a matter of fact I have quite often moderate pains in my left ankle especially after sitting or lying for a while or after a relative long walk.

Response of Mordechai Muscatel to Questionnaire

Re: Accident to Jet Commander 029 on 21.1.1970
Mordechai Muscatel

1. Name: Mordechai Muscatel
   Address: Kfar Witkin (near Nathanya)
   Date of Birth: 20.7.1945

2. Finished technical training school of the Israel Air Force
   Qualifications: Aircraft Electrician and Instrument Repairman

3. Employed with IAI since 29.10.1967

*4. Salary at date of accident: IL 813 = $232.30 per month

5. Present position: Test Flight Technician

*6. Present salary: IL 1172 = $279 per month

7. Returned to work: 22.4.1970, working half days
   10.5.1970, working full time

8-9. Stayed in Shiba (Tel Hashomer) Hospital for 6 days, thereafter ambulatory treatment at local infirmary—see enclosed documents 1 - 2, 3

10. Enclosed document 4 showing that the National Health Institute determined that the permanent disability amounted to 5%.

---

* Salary does not include payment for overtime. It should be noted that social benefits in Israel are very high and amount to 40%-45% of the salary.

Response of Mordechai Muscatel to Questionnaire

11. Payments: National Health Institute

    (a) interim payments for temporary disability total IL 1074.—

    (b) final payment for permanent disability 1879.50

12. Payment made by IAI IL 10,000.—

13. Payments per Para. 11(b) would be taken into account under Israeli Law; payment per Para. 12 is not a question of law since it was an ex gratia grant; it was now agreed that in case Mr. Muscatel's action is successful, he will refund this grant out of the proceeds.

14. Brief statement: Mr. Landau and I tried to open the door of the a/c and we did not succeed. After the bail-out of Mr. Landau, I approached the emergency exit, put my head out and felt that my crash helmet would blow off. I went back to check the straps of the helmet and the parachute and then co-pilot, Hagai Koren, arrived, took my visor down and bailed out. I finished checking the straps and jumped. Further action as described in the official report.

    The above amplifies the statements in the official investigation report.

15. Physical efforts or fatigue due to prolonged standing up or sitting, lifting weighty items, and weather changes cause pain in the back and the right shoulder, varying from slightly disturbing to severe pain requiring rest, diathermine treatment and pain killing pill.

    Also tendency to headaches especially near the part of the head injury (see Documents 5-8).

Response of Hagai Koren to Questionnaire

REFERENCE TO ACCIDENT OF COM. JET 029 QUESTIONS

1. Hagai Koren—23 Gordon Str. Ramat Hasharon Israel. Age at the accident 31.
2. Test Pilot holding CPL. 391. Today ALTP 391 Engineering degree in Aerospace BSc.
3. August 12, 1968.
4. Salary at the accident 2300 IL.
5. Project Test Pilot of Commodore Jet 1123.
6. Salary 4400 IL.
7. May 1, 1970.
8. Two periods from 21-28 Jan. 1970
   from 7-19 March 1970
   Tel Hashomer.
9. Enclosed.
10. Enclosed.
11. Enclosed.
12. One sum of 5000 IL.
13. No such an Israeli law.
14. Correction for paragraph h. The goggles was down on Mr. Muscatell's face by H. Koren to protect his eyes from the wind blow.
    Correction for paragraph K. Mr. Koren had in the past some experience in parachuting from A/C 5 jumps from Dc-3.
15. None.

Exhibits B-D Annexed to Foregoing Affidavit

English Translations of Deeds of Release and Full and Final Accord of Zohar Landau, Mordechai Muscatel and Hagai Koren, dated January 20, 1971, March 1, 1971 and July 3, 1970, respectively, are printed above at pages 186a-194a.

Notice of Appeal of Plaintiff Israel Aircraft Industries, Ltd. from Order of October 26, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that Plaintiff Israel Aircraft Industries, Ltd. hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the Order of the Court dated October 26, 1976 and filed with the Clerk of this Court on October 27, 1976 as dismisses the Complaint of Plaintiff Israel Aircraft Industries, Ltd.

Dated: New York, New York
November 24, 1976

Yours, etc.,

CONDON & FORSYTH
By /s/ THOMAS J. WHALEN
Thomas J. Whalen
A Member of the Firm
Attorneys for Plaintiff
ISRAEL AIRCRAFT INDUSTRIES, LTD.
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 757-6870

Notice of Appeal by Plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren from Order of October 26, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the Order of the Court dated October 26, 1976 and docketed as an opinion by the Clerk of this Court on October 27, 1976, as dismisses the Complaint of plaintiffs, Zohar Landau, Mordechai Muscatel and Hagai Koren.

Dated: New York, New York
December 1, 1976

Yours, etc.

FUCHSBERG & FUCHSBERG
By: .....
Norman Leonard Cousins
For the Firm
Attorneys for all Plaintiffs
Except Israel Aircraft
Industries, Ltd.
250 Broadway
New York, New York 10007
(212) WO 2-2800

Opinion and Order of the District Court dated January 4, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5359

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN and DALIA KOREN,

Plaintiffs,

—against—

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY and NORTH AMERICAN ROCKWELL CORPORATION,

Defendants.

APPEARANCES:

CONDON & FORSYTH, Esqs.
1251 Avenue of the Americas
New York, New York 10020
by Thomas J. Whalen, Esq.
William L. Shierberl, Esq. and
Marshal Turner, Esq.
Attorneys for Plaintiff Israel Aircraft Industries, Ltd.

HALE RUSSELL GRAY SEAMAN & BIRKETT, Esqs.
122 East 42nd Street
New York, New York 10017
by Selvyn Seidel, Esq.
Special Counsel for Plaintiff Israel Aircraft Industries, Ltd.

Opinion and Order of the District Court, dated January 4, 1977

FUCHSBERG & FUCHSBERG, Esqs.
250 Broadway
New York, New York 10007
by Norman L. Cousins, Esq.
Attorneys for Plaintiffs Zohar Landau, Mordechai Muscatel, and Hagai Koren

MENDES & MOUNT, Esqs.
27 William Street
New York, New York 10005
by Dennis Murphy, Esq. and
C. Barry Wetherington, Esq.
Attorneys for Defendants

CARTER, *District Judge*

OPINION

Plaintiffs Israel Aircraft Industries Ltd. ("IAI"), Zohar Landau, Mordechai Muscatel, and Hagai Koren ("the crew members") move for reargument and reconsideration of the court's decision of October 26, 1976, dismissing the complaints of the plaintiffs.

Facts[1]

This suit arises out of an airplane crash which occurred in Israel in January of 1970. The crew members, who were injured in this accident, and IAI, the owner of the aircraft, sued, among others, Standard Precision, a Division of

[1] The facts of this case have been set forth in greater detail in my October 26, 1976 opinion, *Israel Aircraft Industries, et al.* v. *Standard Precision, A Division of Electronics Communications, Inc., et al.*, —— F.R.D. —— (S.D.N.Y. 1976). My reasoning in this opinion will be considerably clearer if that opinion is read together with this one.

Opinion and Order of the District Court, dated January 4, 1977

Electronic Communications, Inc. ("SP"), who was the manufacturer of the wing flap actuator which was alleged to have failed, causing the crash. SP counterclaimed against IAI on the ground that modifications by IAI to the wing flap actuator caused the crash.

After trial, the jury prorated 65% of the responsibility for the crash against IAI, and 35% against SP. SP's prorated liability to IAI for damage to the plane was held to be $301,000. SP's prorated liability to the crew members was held to be $148,750; IAI's to be $276,250.

After this verdict was reached, IAI made a post trial motion for judgment against SP on SP's counterclaim on the ground that the crew members had already been compensated by IAI in exchange for the execution of a release to IAI. IAI argued that if the motion were not granted the crew members would be compensated twice for their injuries. The crew members opposed this motion on the ground that IAI had waited too long to reveal the existence of these releases. SP cross-moved to amend its answer, to assert the defense of release and for judgment against the crew members.

After a careful review of the evidence presented the court by IAI and the crew members concerning the reasons for their failure to reveal the existence of the releases earlier in this litigation, the court dismissed the plaintiff's complaints pursuant to F.R.Civ.P. Rules 37 and 60 because of a failure to properly respond to defendants' discovery efforts, and because of fraud on the court. *See* October 26, 1976 opinion. The court found that:

> "[B]oth the individual crew members and IAI have perpetrated a fraud on the court.
>
> IAI's failure to produce the releases, Schierberl's [IAI's counsel] false assurance to defendants that the

> entire crew members' files would be forwarded, Muscatel and Landau's false answers to written questions and Muscatel's misleading response at his deposition, are all evidence of a pattern of deception clearly meant to frustrate discovery of the releases by defendants and to deprive the defendants, court and jury of information having an important bearing on the dispute.
>
> Accordingly, the complaints of the plaintiff crew members and plaintiff IAI are dismissed in their entirety by the court *sua sponte*." October 26, 1976 opinion, at 20-21.

Shortly after that opinion was filed, IAI and the crew members made the present motions.

No Hearing Was Required

Plaintiffs contend that their due process rights were violated because the court dismissed their complaints without holding an evidentiary hearing. There is no merit in this contention.

Plaintiffs cite *Universal Oil Products Co.* v. *Root,* 328 U.S. 575 (1946), and *Flaks* v. *Koegel,* 504 F. 2d 702 (2d Cir. 1974) in support of their argument. I read neither opinion, however, as requiring a hearing under the circumstances of this case.

In *Universal Oil,* the Supreme Court reversed a Court of Appeals ruling that taxed the losing party with the costs of the amici curiae. In its opinion, the Court did make the suggestion that a successful party should not be deprived of his judgment without the holding of a "proper hearing," *Universal Oil, supra* at 580-81, but this appears to be mere dictum since the Court based its holding on a different basis, *i.e.* that compensation should not be paid amici

curiae who have already been paid by private clients. While I agree with the general proposition that a judgment should normally be vacated only after a hearing has been held, I do not believe that a prior hearing must *always* be held. Nor do I believe that the court in *Universal Oil* intended by its dictum to impose such an absolute rule. Where, as in the instant case, the party facing dismissal has supplied in its moving papers all of the facts relied upon by the court in reaching its decision,[2] that party has had an adequate opportunity to present its version of the facts. Under such circumstances, no hearing is necessary to protect the rights of any party, and I do not believe *Universal Oil* requires one.

Nor do I read the Second Circuit's holding in *Flaks, supra,* as necessitating a hearing under the circumstances. *Flaks* held that where the defendants were faced with the problem of obtaining new counsel because their original counsel had been relieved, the number of interrogatories left unanswered was relatively small, and imposition of sanctions would result in the entry of a large default judgment, the District Court should not have ordered the entry of a default judgment without having conducted an evidentiary hearing to determine defendants' wilfullness in failing to answer interrogatories and to appear at depositions. In reaching this conclusion, however, the Court of

---

[2] The essential facts which formed the basis for the court's dismissal of plaintiffs' complaints—that IAI and the crew members had signed releases which had never been revealed to the court, the jury or defendants until after the jury verdict had been reached, in spite of their obvious relevance to this case and the defendants' substantial discovery efforts—were revealed to the court by the plaintiffs in their post trial motion papers. Nothing that IAI or the crew members have submitted to the court in support of their present motions puts these facts in question.

Appeals specifically found that the District Court's order was based solely on the affidavits of counsel for the party seeking and benefiting from the dismissal. *Flaks, supra* at 710.

As I have just indicated, however, the parties whose claims have been dismissed in this case, the plaintiffs, are also the parties who supplied the court with the information on which the dismissal was based. Had the defendants supplied the court with the facts upon which dismissal was ordered, *Flaks* apparently would have mandated a hearing; but here plaintiffs were not barred from controverting the contentions and allegations upon which the court decision was based. They supplied in toto the foundations for the decision. It is, therefore, ludicrous for plaintiffs to contend that their due process rights were denied because in reaching its conclusion the court accepted the facts they supplied without giving them an opportunity to supply those facts in another form.

There Was A Sufficient Factual Basis for Dismissal of the Complaints

In support of the motion for reargument and reconsideration, plaintiffs have submitted numerous affidavits which they contend prove that there was no factual basis for dismissal of their complaints.

Both IAI and the individual crew members attempt to negate the finding of fraud on the court and jury and to excuse their failure to disclose the releases in response to defendants' discovery efforts by arguing that they did not intentionally keep secret the existence of the releases. Condon & Forsyth, IAI's counsel, contends that it did not even learn of the possibility of the existence of any releases

until after the jury had reached a determination on liability, and waited until after the jury's determination as to damages to reveal to the court the existence of the releases because it was only then that it was certain the releases were relevant to this case. *See* Schierberl affidavit, dated November 5, 1976, at pp. 2-3. IAI, through special counsel Hale Russell Gray Seaman & Birkett,[3] contends that even though the releases were in the crew members' personnel files, IAI not only did not realize that these releases were relevant to the litigation but also did not even realize that they had been named in a counterclaim until after the jury reached a verdict.[4] *See* Ron affidavit, dated November 17,

---

[3] Hale Russell Gray Seaman and Birkett ("Hale Russell") have moved for an order allowing them to appear as special counsel for IAI, on the grounds that IAI may have differences of interest with Condon & Forsyth, or Condon & Forsyth's retaining client, the insurers of IAI; that IAI has had no opportunity to be heard directly in connection with this court's October 26, 1976 opinion; and that the court has reached an incorrect decision regarding IAI. Seidel affidavit, dated November 5, 1976. I have granted this motion to the extent that I have considered the affidavits submitted to me through Hale Russell on behalf of IAI. I should add, however, that I have not been presented with any evidence that suggests any significant differences of interest between IAI and Condon & Forsyth.

[4] I shall not detail IAI's attempt to prove that it was unaware of the relevance of the releases to the litigation; but in essence IAI argues that the real party in interest in this litigation was its insurer, and that IAI had limited contact with Condon & Forsyth, its attorneys of record, who were retained by the insurer. I find this excuse to be totally void of merit. As the party of record, IAI is responsible for actions taken on its behalf. A party cannot prosecute its claim through its attorneys of record, and then later attempt to isolate itself from adverse results that may occur on the ground that it had no contact with those attorneys. This is particularly so where, as here, that party first makes known to the court the fact that it is not the retaining party more than three years after the commencement of the litigation, after a jury trial has been held, and after the court had decided several post trial motions.

1976, at pp. 1-9. The individual crew members contend that they never knew that they had signed "general" releases, but believed they had released only IAI and the Ministry of Defense, and not being educated in the law saw no reason why the existence of the releases should be made known by them to the court or to the defendants. *See* affidavits of Landau, Muscatel, and Koren, dated November 7, 1976, November 7, 1976, and November 5, 1976, respectively.[5] The crew members' attorneys, Fuchsberg and Fuchsberg, on the other hand, contend that it was not until after the jury verdict that they realized the relevance of the releases, and that the information they had been supplied with by the crew members and by IAI gave them no reason to believe that there was any relevant information being withheld from the court or defendants. *See* Cousins's affidavit, dated November 5, 1976, at pp. 4-10.[6]

It is clear to me that these assertions do not undercut either the legal or factual basis of my decision.

As stated in the October 26, 1976 opinion, IAI should have turned the releases over to defendants pursuant to SP's discovery request for the personnel records of the

---

[5] The crew members and their attorneys appear to believe that the court took the step it did only because it considered the releases to be "general", that is, to release all persons from any liability arising out of the airplane accident. This is not so. There is the possibility that the releases are "general" releases under Israeli law, as SP asserts, *see* October 26, 1976 opinion at p. 6, but there has been no finding to that effect. Whether the releases are general releases or not, they were obviously relevant to this litigation, and ignorance as to their legal effect is no excuse for the failure of the crew members to reveal them.

[6] Mr. Cousins contends that the information he was given by the crew members and by IAI's attorneys reasonably led him to assume that the crew members had simply received a workman's compensation-like payment, and therefore he had no reason to believe any release had been signed.

crew members. IAI admits, *see* Ron affidavit, dated November 17, 1976, at p. 9, that the releases were in the crew members' personnel files. Yet the materials turned over to defendants did not include the releases. IAI may not excuse itself for the failure to produce these releases on the ground that it did not understand the nature of the litigation—IAI was a named party in the litigation, and was represented by counsel who clearly understood what defendants were requesting. Furthermore, it is no excuse that IAI's attorneys, Condon & Forsyth, claim they did not know that any releases had ever been signed, since their client, a party to the releases, certainly knew of their existence. Given the obvious materiality of the releases to this litigation, IAI's failure to produce them warrants the extreme sanctions that I imposed.

The situation of the individual crew members is no different. Despite their assertions that they were unskilled in the law and did not realize that what they had signed were "general" releases,[7] the fact remains that the individual plaintiffs are well-educated men and at all times were fully aware that they had signed agreements releasing at least IAI and the Israeli Ministry of Defense. Nevertheless, they proceeded with the prosecution of their suit without ever revealing to the court, the jury or defendants that these releases existed, despite their obvious relevance to this litigation,[8] made even more obvious by the defen-

---

[7] *See* footnote 5, *supra.*

[8] Even if the crew members' attorneys actually had no idea that the releases existed until after the jury verdict came down, and I do not believe that could have been the case, that would be no excuse for the crew members. They knew they had signed some kind of release in exchange for payment by IAI, and they should have made this fact known to the defendants and the court, or at least their attorneys, who would then have had an obligation to do so.

dants' discovery efforts.[9] Moreover, as I wrote previously, it is outrageous that the crew members, having already settled at least a portion of their claims, should come into this court and ask to be fully compensated for their injuries.

The bulk of the evidence presented to the court is meant to show that the failure of both IAI and the crew members to reveal the existence of the releases to the defendants or to the court until after the jury had reached a verdict on damages was excusable, since none of the plaintiffs or their attorneys knew that the releases existed and/or were relevant to this case until that time (more than three years after this case was commenced). Frankly, I find this too incredible to believe.

In conclusion, I have been presented with no evidence that causes me to question the correctness of my earlier opinion in this case. Accordingly, plaintiffs' motions for reargument and reconsideration, having been carefully considered, are denied.

So Ordered

Dated: New York, New York
January 4, 1977

/s/ Robert L. Carter
Robert L. Carter
U.S.D.J.

---

[9] *See* October 26, 1976 opinion, at 6-10, regarding defendants' discovery efforts. These efforts, had they been properly responded to, should have resulted in the production of the releases.

Notice of Appeal of Israel Aircraft Industries, Ltd. from Order of January 4, 1977

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE, that plaintiff Israel Aircraft Industries, Ltd. hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the Order of the Court dated January 4, 1977 and filed with the Clerk of this Court on January 5, 1977 as denies the motion of plaintiff Israel Aircraft Industries, Ltd. for reconsideration of the Court's Order dated October 26, 1976 and filed with the Clerk of this Court on October 27, 1976.

Dated: New York, New York
January 12, 1977

Notice of Appeal of Israel Aircraft Industries, Ltd. from Order of January 4, 1977

Yours, etc.

CONDON & FORSYTH
By /s/ THOMAS J. WHALEN
Thomas J. Whalen
A Member of the Firm
Attorneys for Plaintiff
Israel Aircraft Industries, Ltd.
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 757-6870

Notice of Appeal of Plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren from Order of January 4, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren, hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the Order of the Court dated January 4, 1977 and docketed as an opinion by the Clerk of this Court on January 5, 1977 as denies plaintiffs Zohar Landau, Mordechai Muscatel and Hagai Koren's motion for renewal, reargument and reconsideration of the Court's Order dated October 26, 1976 and docketed as an opinion by the Clerk of this Court on October 27, 1976.

Dated: New York, New York
January 20, 1977

Yours, etc.

FUCHSBERG & FUCHSBERG, Esqs.

By .....
NORMAN LEONARD COUSINS
For the Firm
Attorneys for Plaintiffs
Zohar Landau, Nira Landau,
Mordechai Muscatel, Zila Muscatel,
Hagai Koren and Dalia Koren

Excerpts from Transcript of Document Marking Session on January 10, 1974

[40]

[SAME TITLE]

Continued document marking session taken by plaintiff pursuant to notice dated June 1, 1973, at the offices of Condon & Forsyth, Esqs., 1251 Avenue of the Americas, New York, N.Y. 10020, on January 10, 1974, at 10:00 a.m., before Arlene Perelstein, a Certified Shorthand Reporter and Commissioner of Deeds of the City of New York.

[41] APPEARANCES:

CONDON & FORSYTH, Esqs.
Attorneys for plaintiffs
1251 Avenue of the Americas
New York, New York 10020
By: WILLIAM L. SCHIERBERL, Esq., and
MARSHALL S. TURNER, Esq., of Counsel

MENDES & MOUNT, Esqs.
Attorneys for defendants Standard Precision, Electronic Communications, Inc., The National Cash Register Company
27 William Street
New York, New York 10005
By: JAMES M. FITZ SIMONS, Esq., of Counsel

* * * * *

[120] if the word special were taken out and we merely asked for an agreement, if any, between North American Rockwell and Israel Industries, Ltd., pursuant to which Aerocommander Aircraft serial numbers 29 and 107 were sold?

Mr. Turner: I believe there is reference to the sale of aircrafts 29 and 107 in both the contracts produced under 5 and 6 and also one of the sheets which were provided pursuant to No. 8.

Excerpts from Transcript of Document Marking Session on January 10, 1974

Mr. Fitz Simons: Except for what has already been provided are there any agreements, special or otherwise, between North American Rockwell and Israel Aircraft Industries, Ltd., pursuant to which Aerocommander Aircraft serial numbers 29 and 107 were sold other than the documents which have heretofore been produced by you here today?

Mr. Turner: We do not have any knowledge of such and it is our understanding that that is the extent of the agreements for the sale of these two aircraft.

Mr. Fitz Simons: Do you have anything at all to produce with respect to item No. 11 calling for the personnel records of the individual [121] plaintiffs?

Mr. Schierberl: Not at this time. We are obtaining those records and as soon as we have them I will give them to you.

Mr. Fitz Simons: Although it is not stated in the notice to produce, I would appreciate it if when you are obtaining the records as described in item 11 you would also attempt to obtain the records for any other person who was on board the accident aircraft on the flight where the accident occurred.

I understand that Mr. Schierberl with the exception of caveats which you have put on the record up to this time that we are now completed with the production on behalf of any and all of the plaintiffs, is that correct?

Mr. Schierberl: Yes. The parts which we referred to in the course of the marking of documents this afternoon are here and as I understand it after the Court Reporter leaves, it is now 7:25 in the evening we are going to mark those parts without the aid of a Court Reporter.

Mr. Fitz Simons: And they will become exhibits E, G and I or parts thereof. We have * * *

Excerpts from Transcript of Deposition of Zohar Landau on July 22, 1974

[1]

[SAME TITLE]

Examination before trial of Zohar Landau the Plaintiff, taken by the Defendant, pursuant to notice dated July 5, 1973, held at 250 Broadway, New York, New York on July 22, 1974, at 10:00 a.m., before a Notary Public of the State of New York.

[3] APPEARANCES:

CONDON & FORSYTH, Esqs.
Attorneys for the Plaintiffs
1251 Avenue of the Americas
New York, New York 10020
By: WILLIAM L. SCHIERBERL, Esq., of Counsel.
MARSHALL S. TURNER, Esq., of Counsel.

FUCHSBERG & FUCHSBERG, Esqs.
Attorneys for the Plaintiffs,
250 Broadway
New York, New York
By: NORMAL L. COUSINS, Esq., of Counsel.

MENDES & MOUNT, Esq.
Attorneys for the Defendants,
27 William Street
New York, New York 10005
By: DENNIS C. MURPHY, Esq., of Counsel.

* * * * *

[98] * * * interrogatories, I will leave a space in this report and see if they have been answered.

Mr. Murphy: Fair enough.

Q. Can you tell what your personal salary was from I.A.I.? A. Gross—208 pounds a month.

Q. Do you know the conversion to U.S. dollars? A. It's one dollar to 4.2 Israeli pounds.

Q. Mr. Landau is there a lean in any of the recoveries in anyway as a result of this? In other words, is the amount of money you must pay back to the Israeli Government,

Excerpts from Transcript of Deposition of Zohar Landau on July 22, 1974

could you recover anything in this lawsuit? A. As far as I know I do not have to give to the Israeli Government any money.

Q. I show you this stack of papers relating generally to your medical condition and ask you to look at paragraph 13 and read it please.

Mr. Cousins: To yourself.

A. Yes.

Examination Continued
by Mr. Murphy:

Q. Does that refresh your recollection as to whether or not you must reimburse the Israeli Government [99] for any proceeds?

(Whereupon off the record a discussion was held.)

Examination Continued
by Mr. Murphy:

Q. Mr. Landau I rephrase the question to indicate—must you reimburse your employer or concern for monies that you get in this lawsuit? A. I have the sum to myself.

Q. Do you have the amount of money that you have seventy-five thousand pounds that you mentioned before? That was a lump sum payment? A. Right, now, I don't know if they are going to require additional expenses.

Q. Did you observe the landing of the other members of the crew after you landed? No.

Q. Did you land in the same vicinity? A. I don't know if you call it a vicinity I didn't see any of them throughout the landing.

Q. Do you contemplate any additional surgery or treatments for the injuries you sustained in this accident at any time? A. What do you mean?

• • • • •

Excerpts from Transcript of Deposition of Mordechai Muscatel on July 24, 1974

[1]

[SAME TITLE]

Deposition of plaintiff Mordechai Muscatel taken by defendants pursuant to notice dated July 5, 1973, at the offices of Mendes & Mount, 27 William Street, New York, N.Y. 10005, on July 24, 1974, at 3:00 p.m., before Ashley Coll, a Shorthand Reporter and Notary Public of the State of New York.

[2] APPEARANCES:

CONDON & FORSYTH, Esqs.
Attorneys for Plaintiff Israel Aircraft
1251 Avenue of the Americas
New York, New York 10020
By: WILLIAM L. SCHIERBERL, Esq., of Counsel.

FUCHSBERG & FUCHSBERG, Esqs.
Attorneys for all Plaintiffs except Israel Aircraft
250 Broadway
New York, New York
By: NORMAN COSINS, Esq., of Counsel.

MENDES & MOUNT, Esqs.
Attorneys for North American Rockwell
27 William Street
New York, New York 10005
By: DENNIS C. MURPHY, Esq., of Counsel.

* * * * *

MUSCATEL

[35] A. No.

Q. Is there an agreement with your employer, IAI, that you must pay them back money they have paid you if you receive money in this lawsuit? A. Yes.

Q. Can you tell me how much money you received in benefits or pensions as a result of these injuries up to the present time? A. Yes, I've got 10,000 pounds.

Excerpts from Transcript of Deposition of Mordechai Muscatel on July 24, 1974

Q. Was that a single payment from your employer? A. Single time, once.

Q. Do you now receive any pensions from either the government or your employer as a result of these injuries? A. Not right now, but I did get, because of my temporary invalidity.

Q. At the present time, do you still have a disability rating of five percent? A. Yes, for always.

Q. Are you receiving a special pension for this disability? A. No, because of those kinds of invalidity we get it just once, altogether.

Q. Is it a correct statement you returned to work on April 22, 1970?

* * * * *

MUSCATEL

[40] *by Mr. Cousins:*

Q. Were you receiving flight pay back in 1970 when you were on the flight tests? A. Yes.

Q. Are you receiving flight pay now? A. Yes.

Q. Can you tell us what the 10,000 pounds lump sum payment you received from IAI represented? A. I think there was an agreement between me and IAI to get that sum of money because of what happened to me.

Q. Does the sum of money have some relationship to—let me withdraw that. Was this money paid to you as a result of your injuries sustained in this accident? A. Yes.

Q. Pursuant to the agreement between yourself and IAI, this money must be repaid to them out of any you might get as a result of this law suit? A. Yes.

Q. Do you feel as healthy and well today as you did before the accident?

Mr. Murphy: I object to the form of the question. Would you explain what you mean by healthy? * * *

Excerpts from Transcript of Trial

[1]

[SAME TITLE]

January 7, 1976
10:15 a.m.

Before:

HON. ROBERT L. CARTER,
District Judge.

APPEARANCES:

CONDON & FORSYTH, Esqs.
Attorneys for Plaintiff IAI
WILLIAM L. SHIERBERL, Esq. and
MARSHAL TURNER, Esq., of Counsel.

FUCHSBERG & FUCHSBERG, Esqs.
Attorneys for Plaintiffs
Hagai Koren and Dalia Koren
NORMAN COUSINS, Esq., of Counsel.

MENDES & MOUNT, Esqs.
Attorneys for Defendants
DENNIS MURPHY, Esq. and
C. BARRY WETHERINGTON, Esq., of Counsel.

* * * * *

[29] court require that the first named plaintiff who in this case is the owner of the aircraft, Israel Aircraft Industries, present their proof first, you will not be hearing very much from me because Mr. Schierberl will be presenting the entire case and our proof will substantially be the same.

To avoid of course needly representation, I will be reserving most of my comments and participation and proof until after the members of the jury decide the responsibility among the defendants for the injuries.

And, after that has been resolved, then I will have an opportunity to present to you the medical testimony and the actual presentation of the proof and injuries in this serious personal injury case.

I noticed in the Judge's remarks yesterday, during voir dire when the jury was selected his Honor I am sure wholly

unconsciously used the term "next of kin." No one was killed fortunately in this case and when someone is killed next of kin bring a lawsuit.

These are all cases for personal injury, unfortunately not wrongful death although as fatal of the pilot, the one member of the crew who was uninjured, was unfortunately killed in a wholly unrelated accident some weeks ago and who, of course, will not be here to testify.

• • • • •

[1530] aircraft to Israel, and they resulted, in each and every case, in a distortion of the flap system and an emergency landing, creating its own dangers, and we haven't gone into the problem of landing an aircraft with the flaps up. You need more runway, you can blow a tire, you can heat up the brakes to the point of failure. So the removal of the shear pins by IAI is greatly reduced, in my opinion as a pilot.

Now, nothing IAI did, in my opinion, in any way caused this accident. The aircraft, as we know, sustained its failure way below the 18,000-pound gross weight certified by Rockwell standards. We know it even took off below that weight. We know that the strengthening of the fuselage puts no load whatsoever on an actuator, nor does the putting on of the tip tanks with the upping of the gross weight. The only thing the actuator knows is the amount of force imposed upon it.

That calculation, the slight modification in geometry, was testified to by Miriam Rosen, and nowhere during the course of this trial has there been any contradiction of any of her calculations which showed that anything which might have had an effect on the actuators and the loads imposed upon them was incorrect.

I think the crew members in this case were innocent

• • • • •

Excerpts from Transcript of Trial

[1573] * * * you can get a decision and a judgment without fear or favor, it's in this United States District Court.

So, whatever else, please, ladies and gentlemen of the jury, you do here, lay aside all together the suggestion which was raised not by the plantiffs in this case but by the defendants in this case by their questions and emphasis throughout that somehow that might make a difference.

I leave that to you. Please remember that your verdicts are heard beyond this place and that is how this Court has its reputation for fairness and justice.

Please remember that the verdict you give here in this case is going to become a part of the record of this Court which is 200 years old. It is going to become a part of the record of justice which we normally talk about a concept. It is going to be a real substantial verdict, a real substantial finding for justice and I think that we have given you enough evidence from this witness stand, leave aside again the lawyer's words, we have given you enough evidence from this witness stand through testimony and solid evidence here and admissions by the defendants that I believe I have earned the right to come to you now and ask for your verdict in favor of plaintiff, Israel Aircraft Industries, Hagai Koren, Zohar [1574] Landau and Mordechai Muscatel in all respect.

There remains only for me to express my gratitude for your attention in this long and tedious case.

On behalf of Israel Aircraft Industries, Mr. Koren, Mr. Landau and Mr. Muscatel and Mr. Turner and of course myself, thank you very much.

The Court: All right, we will adjourn for lunch. Return at 2:15. I will give you five more minutes. You may leave now.

(Jury not present)

The Court: It is a late time to raise a question, but quite frankly I had forgotten about it entirely and that is—well,

I thought about it before, but Mr. Cohen raised the question and I should have put it to you before we started the case and that is what kind of verdict do you want?

Mr. Wetherington: Your Honor, do you mean whether you want a general verdict, special verdict, written interrogatories?

The Court: No, I meant in terms of explanation to the jury whether you wanted six jurors or five to one; the majority or unanimous.

Mr. Schierberl: May we just talk about this,

* * * * *

[1633] * * *

No.

"If your answer to number 1 was 'Yes' for any defendant, and your answer to number 2(a) was 'Yes,' what is the extent to which the negligence of each party who you have already determined was negligent caused the crash?"

Standard Precision, a Division of Electronic Communications, Electronic Communications, National Cash Register, 35 percent. North American Rockwell, 0. Israel Aircraft Industries, 65 percent.

"Is North American Rockwell liable to Israel Aircraft for breach of warranty?"

No.

The Clerk: Members of the jury, listen to your verdict. As to question 1: "Do you find that there was negligence on the part of any of the defendants that caused or was one of the causes of the crash of the jet plane?"

Standard Precision and Electronic Communications, your answer is yes. The National Cash Register is yes. As to North American Rockwell Corporation, your answer is no.

Question 2(a) "Do you find that there was negligence by plaintiff Israel Aircraft Industries that caused or was one of the causes of the crash of the jet plane?"

* * * * *

Excerpts from Transcript of Trial

[1714] ISRAEL AIRCRAFT INDUSTRIES, *et al.*

v.

STANDARD PRECISION, *et al.*

January 28, 1976,
10:30 A.M.

(In open court; jury not present.)

The Court: Gentlemen, I forgot to mention it yesterday, but obviously there is a need and a very quick need for your requests to charge, and I want them in today.

Secondly, I think that by virtue of the jury's decision, I trust that all of you now realize how this case has been realigned, and that is that the individual—and I am going to tell the jury that—the individual plaintiffs are now in fact suing Israel Aircraft Industries and Standard Precision and Israel Aircraft is suing Standard Precision. That's how the case is.

I want to be sure everybody understands that.

Mr. Schierberl: On that point, of course I respectfully except and I would like an opportunity, because of the importance of it, to brief that point and I would like to be heard on motions before the case goes to the jury in that respect.

The Court: You can do anything you want. The point is that as I now understand the law of comparative negligence, [1715] the jury has decided that Israel Aircraft is responsible for 65 percent of it and, therefore, there is a contribution. Any award is going to have to be shared between the two of you. There is nothing I can do about that.

Excerpts from Transcript of Trial

Mr. Schierberl: We have certain defenses in that regard, including the exclusive remedy of Workmen's Compensation, which has been paid.

The Court: But the problem with that in terms of Workmen's Compensation, it appears to me if you want that to be considered you are going to probably have to plead that. That is not the issue. The issue, as far as I now understand it, is that whatever the jury awards to these individuals, if it awards anything, has to be shared between the two people that they said are responsible for the accident.

Mr. Schierberl: If your Honor please, I do not believe the law is that settled and I would like to be heard on it.

Mr. Cousins: Mathematically you are 100 percent correct, but I believe it is a misstatement to indicate to the jury that the crew members are suing IAI. We are not. We would get a judgment against the defendants.

The Court: You will not. You will get a judgment in this court against IAI. That is how the procedure is now.

* * * * *

DAVIS—Direct

[1791] I asked him to tell us what his figures are and how he went about it, and if he will tell us that, if it's admissible, you can put it in.

Mr. Schierberl: I thought it would aid us in getting to the bottom line.

The offer is withdrawn at this time.

Q. What considerations, then, were there in reaching a fair market value for the aircraft, number one, and, number two, please, what fair market value did you reach?

The Court: Tell us what fair market value you reached, that's what I want to find out, of the aircraft, and then, in your own way, tell us how you went about it.

A. I have calculated a fair market value of the airplane at the time of the accident of $1,232,636.

It was developed by beginning with the fair average market value of a fair, or green as it's called—

Q. Did you say "green," sir? A. Green, as it's called in some companies; a striped airplane of the Model 1121 series at the time of the transfer of the Jet Commander to Israel Aircraft, of $560,000. That was the price which we paid Rockwell Standard as the distributor for these airplanes.

Q. At what time are you talking about, sir? A. This is in 196[illegible] 19—from 1965 until Israel • • •

• • • • •

DAVIS—Cross

[1851] Mr. Schierberl: That is all I wanted, thank you.

The Court: Of course you are going to be able to do that.

The Witness: Your Honor, could I ask one question of you? You had mentioned a moment ago the fair value and then you said the fair market value.

The Court: The problem I have, I am probably using it loosely, but in any event you are to give us what the fair value of this airplane is.

You evaluated airplanes, you have indicated, and this is what we are trying to get at. If you make a difference between fair value and fair market value, then tell us what the difference is. Tell us what would be the fair market value as opposed to the fair value, maybe that would help.

Q. Tell us what fair market value is and tell us what fair value is. Go ahead. A. Fair market value is the price

established in the marketplace of what airplanes or anything being sold sells for at that given time.

The fair value to me was the fact that nobody else could use this aircraft but Israel Aircraft, but the value of this aircraft to Israel Aircraft was $1,232,536.

* * * * *

GLASSGOLD—Cross

[1927] * * *A. I do not know, sir. I can tell you—I know the total investment to March 31, 1970, in this program. The total investment was eighteen and a half million dollars in the whole development program, of which $5,000,000 was spent on the development program itself.

Q. The total loss on the books is what we are after. A. I do not know exactly, sir, but I know that all of the expenses charged to aircraft 29, all of these hours, everything was written off the books.

Q. Is there any reason you don't know the total loss? A. It is just because I am not near the books, sir.

Q. When you spoke to Nellie Haimov could she have told you what the total loss was? A. She did not have the breakdown at her fingertips when I spoke to her on the phone.

Q. I mean, could you have spent a few minutes to have received this information?

> The Court: That is not a question. She told you she doesn't have it. Don't argue with her. She told you she doesn't have the figures. How she could have gone about getting it is something else.

* * * * *

GLASSGOLD—Cross

[1931] * * * Commodore Jet mean? A. Commodore Jet was the name given to the aircraft in previous years. It was later changed for marketing purposes.

Excerpts from Transcript of Trial

Q. What does Westwind include? A. Today we talk of the whole program as being Westwind.

Q. What is the whole program? A. The Models 1123 and Models 1124.

Q. 1124? A. We are now working on Model 124, a new model.

Q. So this eighteen and a half million dollars has something to do with a new model 1124? A. It does not. It has to do with money invested up to March 31, 1971, in this program.

The Court: Quite frankly, I don't understand. I am not going to allow you to get involved in eighteen and a half million dollars. It is a figure just introduced today. There is no point in going down that road.

Mr. Wetherington: I didn't ask for an eighteen and a half million dollar figure and no question I asked should have brought that response. Now the jury has that figure in front of it and I have to discredit it.

The Court: The point is the eighteen and a half million dollar figure was the total program in terms of * * *

* * * * *

GLASSGOLD—Recross

[1993] Mr. Wetherington: If I am going to have two minutes, I would ask you to instruct the witness to answer my questions so it doesn't come out of my time with her going on expounding.

The Court: What was the cost of the interruption is the question. Do you have any figures on it?

The Witness: The cost was loss of goodwill. The cost was—

Excerpts from Transcript of Trial

By Mr. Wetherington:

Q. Could you give it to us in dollars, please? A. The interest on the investment up to this point, we invested up to the point I already testified eighteen and a half million dollars.

Mr. Wetherington: Could you please instruct the witness to give me the answer?

The Court: I don't think you are answering that question, Mrs. Glassgold. Do you have any figures for what the interruption cost was? Have you figured it out in dollars and cents?

The Witness: I have not personally calculated it.

The Court: Do you have any figures on what you say you lost in the world sales market?

The Witness: I do not, sir.

* * * * *

[2232] * * * carried out is causally related, I do not know. In any event, there is no function of disability at this time," and he does note, and I quote, "the groin scar is described."

The Court: Mr. Cousins, you apparently have missed what Mr. Murphy's argument is. Mr. Murphy says that his doctor was aware of that operation but he says it's similar or akin to a varicose vein operation and it doesn't have anything to do with the claim you are making. The doctor looked upon it as being that and wasn't aware of anything else. All right.

How much time will you gentlemen want for summation?

Mr. Cousins: Your Honor, I put it short before, but I have three plaintiffs now, and I ask for the total three of them, not more than an hour. If I can do it in less, I will do it in less.

Mr. Murphy: Half an hour.

Mr. Schierberl: Half an hour, your Honor.

I have one application. At this time I respectfully move that the pleadings be amended to conform to the proof and to include an item of damages of plaintiff Israel Aircraft Industries the interest on the investment of $18.5 million for the eight month period from the date of the accident, that is January 21 –

[2333] The Court: On what?

Mr. Schierberl: Interest on investment in accordance with the proof of $18.5 million for the eight month period that the program was interrupted.

The Court: I haven't had any proof on that.

Mr. Schierberl: Your Honor, page 1927 in the record, the defendants themselves opened up this area and that is part of the proof in this case. That there was that loss.

The Court: Loss of $18 million?

Mr. Schierberl: No, sir. The interest on $18.5 million for the eight months the program was interrupted.

The Court: You mean that is a measure of damages because you lost that time?

Mr. Schierberl: Yes, your Honor.

The Court: What theory do you have on that?

Mr. Schierberl: Your Honor, that is a direct loss attributable to the loss of this aircraft.

The Court: On what theory? What theory of damages is that?

Mr. Schierberl: To restore the plaintiffs here to the place they were before they lost this aircraft, under either the law of New York or the law of Israel.

The Court: I don't understand. The program was * * *

* * * * *

[2482] allocations and that testimony is not controverted in any place on this record.

Finally, Mr. Davis told us, based on his experience, tha the final figure in the amount of $1,232,536 is the fair and reasonable value of the aircraft after the modifications had been completed.

He said, Page 1791, "I have calculated a fair market value of the aircraft at the time of the accident of $1,232,636."

Now, we know from other testimony in the case, including that of Mr. Davis, that it may be difficult to go out and sell aircraft 029, let's say on the day before it was lost, because we know that it was an unusual aircraft. We know that it was a test aircraft. But the point is this was the value to its owner, and that is what was lost, and that is the amount which it would take to, in fairness, please, restore Israel Aircraft Industries to someplace near where it was before the program began.

Now, as I say, the only discounting you have on this point is the testimony of Mr. Jenkins. I have to comment on that; it is my obligation to comment on that. I think you should give this—respectfully I suggest you should give this serious thought.

Remember when Mr. Jenkins was contacted for the * * *

* * * * *

[2516] (At 1:50 p.m., the jury returned to the courtroom).

The Clerk: Madam forelady, has the jury agreed to a verdict?

The Forelady: Yes.

The Clerk: Would you read your verdict, please.

The Forelady: Question number 1: "What is the total amount of damages that Israel Aircraft Industries suffered as a result of the airplane crash? $860,000.00.

Excerpts from Transcript of Trial

"Take 35 percent of the number you have found. This is the liability of defendant, Standard Precision, to plaintiff Israel Aircraft Industries. $301,000.00.

"2. What is the total amount of damages that each plaintiff crew member suffered as a result of the airplane crash?

"1. Mr. Landau, $275,000.00.

"2. Mr. Muscatel, $135,000.00.

"3. Mr. Koren, $15,000.00.

"This amount is the liability of defendant, Standard Precision, to each crew member.

"Add up the three figures representing the amount of damage suffered by each crew member; $425,000.00.

"Take 65 percent of this amount: $276,250.00."

The Clerk: Members of the jury, listen to your * * *

Legal Opinion of Dr. D. Hermann

LEGAL OPINION

—A—

PERSONAL DATA

1. a) I am a practising lawyer as from 1935. I acted as lawyer in Rumania till 1944, the legal system of which was mainly based on French Law (Code Napoleon), in Hungary till 1944 (2 years therefrom clandestinely because of the anti-Jewish Laws), the legal system of which was based mainly on Austrian-German Law, in Palestine, during the English Mandate and in the State of Israel as from 1948, the legal system of which was and is mainly based on Anglo-Saxon Law. At present Israeli Law is a mixture of Mandate Law, English Law, New Israeli Law and in matters of personal status, Religious Law;

   b) I am Doctor Juris, having received my degree at the University of Cluj (now Rumania). I am also "Diplomkaufman", i.e. graduate of the College for World Commerce of Vienna;

   c) I acted as lecturer of Air Law at the Hebrew University of Jerusalem and the University of Tel Aviv for about 20 years;

   d) As from 1949, I am General Counsel and Legal Adviser of El Al Israel Airlines Ltd. In this my capacity, I arranged and supervised the settlement of many hundreds of claims by and against El Al and by and against underwriters;

e) I am thoroughly acquainted with the various aspects of Private International Law, Contract Law, Tort Law, with all their ramifications.

2. In this Opinion:—

a) "THE US CASE"—Civil Action 72 CIV 5359 RLC, pending before the US District Court, Southern District of New York;

b) "SP"—Standard Precision A Division of Electronic Communications Inc., Electronic Communications Inc., The National Cash Register Company. together;

c) "IAI"—Israel Aircraft Industries Limited;

d) (1) "LANDAU"—Zohar Landau;

(2) "MUSKATEL"—Mordechai Muskatel;

(3) "KOREN"—Hagai Koren;

(4) "LMK"—Landau, Muskatel and Koren, together;

e) "THE AIRCRAFT"—Jet Commander Aircraft 4X-COJ owned by IAI;

f) "THE ACCIDENT"—accident which occurred on 21.1.70, due to which the aircraft was destroyed and LMK were injured;

g) (1) "THE IAI LAW SUIT"—claims made in the US Case by IAI against SP, for damages in respect of loss and destruction of the aircraft;

(2) (aa) "THE LANDAU LAW SUIT"—claims made in the US Case by Landau against SP,

for damages suffered as a consequence of the accident;

(bb) "THE MUSKATEL LAW SUIT"—claims made in the US Case by Muskatel against SP, for damages suffered as a consequence of the accident;

(cc) "THE KOREN LAW SUIT"—claims made in the US Case by Koren against SP, for damages suffered as a consequence of the accident;

(dd) "THE LMK LAW SUITS"—The Landau claim, the Muskatel claim and the Koren claim together;

h) (1) "THE LANDAU DEED OF RELEASE"—the document entitled "Deed of Release and Full and Final Accord" dated 20.1.71, signed by Landau (translation from Hebrew into English attached hereto, Appendix "A");

(2) "THE MUSKATEL DEED OF RELEASE"—the document entitled "Deed of Release and Full and Final Accord" dated 1.3.71, signed by Muskatel (translation from Hebrew into English attached hereto, Appendix "B");

(3) "THE KOREN DEED OF RELEASE"—the document entitled "Deed of Release and Full and Final Accord" dated 3.7.70, signed by Koren (translation from Hebrew into English attached hereto, Appendix "C");

(4) "THE DEEDS OF RELEASE"—the Landau Deed of Release, the Muskatel Deed of Release and the Koren Deed of Release together;

Legal Opinion of Dr. D. Hermann

i) (1) "THE COMMITTEE OF INVESTIGATION"—Committee appointed by the Minister of Transport of the State of Israel for the investigation of the accident;

(2) "THE INVESTIGATION REPORT"—report dated August 1970 of the Investigation Committee in respect of the accident.

—B—

FACTS

3. In accordance with the conclusions of the Investigation Report the accident was caused by defective material and defective workmanship of the wing flap actuators (hereinafter "THE ACTUATORS"), which were manufactured, sold and supplied by SP to IAI.

4. a) LMK claimed from IAI damages for the injuries suffered by them pursuant to the accident;

b) (1) As regards these claims, IAI on the one part, and each of LMK, on the other part, reached agreement according to which IAI undertook to pay to each of the defendants, ex gratia and without admitting liability, certain amounts, and to continue to employ each of them under certain conditions in full settlement of all claims of LMK against IAI, in respect of the accident (see Deeds of Release, Appendices "A", "B" and "C");

(2) The three Deeds of Release, to a substantial extent, being identical in contents, are in some points coached in different terms.

5. a) (1) In 1971 IAI filed the IAI law suit against SP;

(2) In or about the same time, LMK filed the LMK law suits against SP;

b) (1) In the IAI law suit, SP counterclaimed against IAI, alleging that the negligence of IAI itself caused the accident, and that, therefore, it is IAI who is responsible for the consequences of the accident, in whole or in part;

(2) Within the framework of the US Case there is no law suit of LMK against IAI, in respect of the damages suffered by them pursuant to the accident;

c) (1) In the US Case damages were awarded to each of LMK;

(2) Furthermore, it was decided in the US Case that:—

(aa) As between SP and LMK, SP are responsible for the whole amount (100%) of the damages awarded;

(bb) As between SP and IAI:—

(i) SP is liable for 35% of the amounts awarded to LMK; and—

(ii) IAI is liable for 65% of the amounts awarded; and therefore—

(iii) SP are entitled to recourse against and reimbursement from IAI at the rate of 65% of the amounts awarded;

d) (1) At this stage it is worthwhile to mention that, IAI alleges that in 1972, i.e. about two years after the LMK Deeds of Release, another agreement (hereinafter "THE ADDITIONAL AGREEMENT") was entered into between IAI and LMK, whereby without affecting the other provisions of the LMK Deeds of Release:—

(aa) IAI, being the employer of LMK, undertook to advance and/or cause the advance of the expenses, except lawyers fees, connected with the LMK law suits, in order to enable LMK to file same against SP; and—

(bb) LMK, on their part, in case of the success of the LMK law suits, undertook to repay IAI both the expenses to be incurred by IAI as aforesaid, and, in addition thereto, also the amounts paid to each of them under the Deeds of Release. In case of failure of the LMK Law Suits, no obligation of such refund lie with LMK;

(2) As a matter of fact, the above expenses have actually been advanced and paid by IAI or caused by IAI to be so advanced and paid;

(3) IAI alleges that the additional agreement which was drafted in writing is unavailable due to misfiling. Landau denies the existence of the additional agreement. Muskatel admittedly acknowledged the existence thereof. Koren's reaction is not clear;

(4) (aa) I should like to point out that except as mentioned in Art. 13 below, this my opinion is unaffected, by the existence or non-existence of the additional agreement;

(bb) The uncontested fact of the expenses being advanced by IAI as aforesaid, is in some instances taken into consideration as one of the factual elements supporting legal conclusions, but even in those points where I took into consideration this fact, the conclusions would be unaltered, even if IAI would not have advanced to LMK expenses as aforesaid.

6. a) Before starting the legal analysis of the case, another factual point should be given some attention;

b) I am informed that according to the verdict of the jury, the 65% share of negligence of IAI, was based on two alleged faults of IAI, namely:—

(1) Replacement of shear pins by rigid pins; and—

(2) Faulty flap travel geometry;

c) (1) The Investigation Report expressly dealt with both points, as possible causes or contributory causes of the accident;

(2) But, after examining both points, the Investigation Report came to the conclusion that neither fact can be considered as a cause, or contributory cause of the accident (as regards the pins, see Art. 14 f) and 16d), and as regards the

geometry, see Art. 14d) of the Investigation Report);

(3) The Investigation Report is dated prior to the Deeds of Release, and each of LMK, at the time of the execution of the Deeds of Release, was aware of the Investigation Report and of its comments as regards the above two points, on which the verdict of the jury established liability of IAI, as between IAI and SP.

7. a) Shortly after the verdict establishing the respective shares of liability of SP and IAI, on the one part, and, the award of damages to LMK, on the other part, pursuant to the Deeds of Release and based thereupon, IAI demanded from each of LMK:—

(1) To reduce their claims against SP by 65%, the share of liability of IAI established by the verdict;

(2) To refrain from collecting from SP any amount on the account of the damages awarded and or to be awarded to them, by any judgement in the USA in their favour, which under the terms of such judgment are reimbursable by IAI to SP; and—

(3) To release SP from 65% of the amounts awarded or to be awarded as aforesaid;

b) LMK informed IAI that they refuse to accede to IAI's request.

Legal Opinion of Dr. D. Hermann

—C—

LEGAL ASPECTS

8. Basic questions to be answered in this opinion are:—

a) "The IAI contribution in the compensation"—any amount out of the total amount of compensation awarded and to be awarded by the US Courts against SP in favour of LMK and in respect of which the US Courts decided and/or will decide that SP shall have the right of recourse against and reimbursement from IAI;

b) (1) What is the legal effect of the Deeds of Release given to IAI on the liability of SP?;

(2) Do the Deeds of Release release also SP from its liability for the consequences of the accident, and if so, to what extent?;

c) (1) What is the legal effect of the Deeds of Release, as between IAI and LMK, in relation to the damages awarded in their favour against SP?;

(2) Are LMK obligated, either:—

(aa) To refrain from collecting from SP the IAI contribution; and/or—

(bb) To reduce their claim against SP in the amount equal to the IAI congribution and to release SP from its obligation to pay same; and/or—

(cc) In the event of collection by LMK from SP of any amount on account of the IAI contribution, to refund and restitute such amounts to IAI;

d) If the answers to the questions raised in b) (2) and c) (2) above are in the affirmative, what are the legal grounds for such affirmative answers?

9. Relevant laws:—

a) "The Law of Torts" — Civil Wrongs Ordinance (New Version) published in the Laws of the State of Israel (New Version) No. 10, 17.4.68. This New Version constitutes a recodification and consolidation of the earlier law published in 1944, and its subsequent alterations;

b) (1) "The GP Law of Contracts"—the Law of Contract (General Part), 1973;

(2) The GP Law of Contract came into force on 29.8.73 (See Art. 64 of same);

c) (1) "The RB Law of Contract" — the Law of Contracts (Remedies for Breaches of Contract), 1970;

(2) The BR Law of Contract came into force on 23.3.71 (See Art. 25 of same).

10. Liability of joint tortfeasors. *Distinction between joint tortfeasors proper and concurrent tortfeasors.*

a) Under Israeli Law the notion "joint tortfeasors" (wrong-doers) include two categories of tortfeasors, namely:—

(1) Where the concerted act of two or more persons cause the damage (hereinafter "JOINT TORTFEASORS PROPER"); and—

(2) Where two or more persons by separate acts, not done in pursuance of a concerted purpose cause the damage, (hereinafter "CONCURRENT TORTFEASORS");

b) (1) The Israeli Law of Torts is to a large extent based on the English Law of Torts, although in some essential respects, different from same;

(2) Under English Law:—

(aa) Liability of joint tortfeasors proper, is joint and several, each being liable for the whole damages; whilst;

(bb) Liability of concurrent tortfeasors is several, each tortfeasor being liable for his share in the damage;

c) In Israel both the Courts and the scholars agree that the notion "joint tortfeasor" includes both categories of tortfeasors, i.e. joint tortfeasors proper and concurrent tortfeasors, and that each of them is jointly and severally liable;

d) (1) (aa) "When each of two or more persons is liable under the provisions of this Ordinance for any act and such act constitutes a civil wrong, such persons shall be jointly liable as joint civil wrongdoers for such act, and may be sued therefore jointly and severally" (Art. 11 of the Law of Torts);

(bb) "Fault—means any act of any person, or failure by any person to do an act, being a civil wrong under this Ordinance, or be-

ing a civil wrong if damages caused thereby . . . and *a person shall be deemed to cause damage* by his fault *when the fault* was the cause or *one of the causes of the damage* . . ." (Art. 64 of the Law of Torts);

(2) (aa) "Held . . . A distinction should be made between joint tortfeasors (my remark: Joint tortfeasors proper) and tortfeasors who incidentally concurred in causing the same damage (several concurrent torts). The joint tortfeasors (proper) participate not only in causing the same damage, but also in performing the act which caused the damage. In case of tortfeasors who incidentally concurred in causing the same damage, each of them causes damage by his separate wrong.

Each of the wrongdoers is liable for the amount of damages in whole, solidarily (my remark: jointly and severally), both in case of joint tortfeasors (proper) and in case of tortfeasors who incidentally concurred to cause the same damage." (Supreme Court of Israel—SCJ—Civil Appeal No. 260/56, Supreme Court Judgments—SCJ—1957, Volume III, page 1157);

(bb) In Art. 55b(1) (Old Version of the Law of Torts identical with Art. 64 of New Version) of the Law of Torts) we read:

"A person shall be deemed to cause damage by his fault, when the fault was the cause or *one of the causes* of the damage . . . Consequently, if the damage, i.e. the same damage, was caused by two "faults", as defined in Art. 21(2) (my remark: Old Version merged into Art. 64 of New Version) each of the "faultdoers" is liable for the whole damage. Also in our country it is possible to claim from each such wrongdoer or from any one of them. . . ." (Ditto page 1166. Remark: The above is not a verbatim quotation);

(3) (aa) "The principle that joint and several liability means that all joint tortfeasors (irrespective of whether they are joint tortfeasors proper or tortfeasors who caused the same damage) are jointly liable towards the injured party and may be sued jointly and severally is based on Art. 11 of the Law of Torts. . . ." (G. Tedeschi: Torts page 486);

e) Consequently, the answer to the first problem is that in Israel both categories of tortfeasors are deemed joint tortfeasors and they may be sued jointly and severally for the damage caused.

11. *The effect of release of one joint tortfeasor, on the liability of other joint tortfeasors:*—

a) As regards this point we have to distinguish between two periods, namely:—

Legal Opinion of Dr. D. Hermann

(1) The period before the 29.8.73 (hereinafter "THE ANTE-PERIOD") the date on which the GP Law of Contract came into force; and—

(2) The period after the 29.8.73 (hereinafter "THE POST-PERIOD");

b) (1) The law is well-settled in the "Post-period";

(2) The law on this question is less well-settled in the ante-period, although the decisions of the Courts in Israel follow, rather consistently, the same line;

c) I will deal with the answer to the above question separately in respect of each of the two abovementioned periods.

12. a) What is the effect of the release given to one joint wrongdoer, on the liability of the other joint wrongdoers, in the post-period?;

b) (1) Art. 55c) of the GP Law of Contract reads as follows: "Where the creditor released one of the debtors from his debt, in whole or in part, by waiver, release, compromise or any other manner, the other debtor shall also be relieved *to the same extent,* except if contrary intention can be gathered from the document of release";

(2) Art. 61(b) of the GP Law of Contract reads as follows: "The provisions of this law shall apply mutatis mutandis and to the extent same fit, also to legal acts not being contracts and obligations not resulting from contracts";

(3) Consequently, Art. 55(c) of the CP Law of Contract is applicable not only to contractual joint obligations, but also to joint obligations resulting from tortious acts;

c) (1) All Deeds of Release (of LMK) bear dates in the ante-period. Consequently, it can be well-argued that the GP Law of Contract is not applicable at all to the instant case;

d) (1) Since, as mentioned above, the law is not quite clearly settled in the ante-period, it might also be argued that the GP Law of Contract constitutes the authentic interpretation of the law in the ante-period, and as such, constitutes the answer to the doubts which arose in the ante-period;

(2) This argument will be strengthened by my remarks below, dealing with the quasi-contractual aspects of the case;

e) (1) If it would be decided that the GP Law of Contract is applicable, as regards this problem also to Deeds of Release and obligations of contribution arising in the ante-period, then we have got a problem of interpretation of Art. 55(c);

(2) A and B are joint tortfeasors, liable to C. C gives full release to A. What is the extent of the liability of B towards C, under Art. 55(c) of the GP Law of Contract?;

(3) B is relieved from liability "to the extent" A is relieved. What is the meaning of the words "to the extent"?;

(4) The test is "the hypothetical law suit". Assume that LMK (C) files action both against SP (B) and against IAI (A) for $1,000 damages, pursuant to the accident. Assume further that a verdict is given stating the total amount of damages to $1,000 and dividing the liability as between SP and IAI as follows: SP (B) 35%, IAI (A) 65%. What would be the judgement if LMK (C) gave, as they actually gave, full release to IAI (A)? It is clear that in such case judgement would be given as follows:—

(aa) Claim against IAI (A) would be dismissed;

(bb) Claim against SP (B) would be allowed to the extent of 35% i.e. $350 of the damages, since in view of the Deed of Release given to IAI (A), whose share of liability is fixed at 65%, also SP (B) is relieved to the same extent i.e. to the extent of 65%, i.e. $650, which is the share of liability of IAI (A);

(5) "Where in a case of contribution against an insurer, who has not yet been obligated to pay compensation to the insured party, the problem of liability of the former against the latter arises, the approach should be that the answer to this question should be determined according to the judgement which would be given in the hypothetical case of the injured party against the insurer and the insured". (remark: in lieu of the words "judgement which would be given" the words "result which would end" are

used in the original. The exact meaning is reflected in the above modified translation). (Civil Appeal No. 370/63, Supreme Court Judgements Volume 18/I, 1964, page 533, at page 535.

13. a) As regards the effect of a Deed of Release given to one wrongdoer, on the liability of other joint wrongdoers, the legal situation is less clear;

b) Since the Law or Torts of Israel was drafted, more or less based on the English Law of Torts, authorities followed for a long period of time the English precedents, based on the English Common Law of Equity;

c) The gist of the English law is in a lucid and succinct manner reflected by Tedeschi (Supra), para. 288, page 487: "The established rule of the English Common Law was that the cause of action of the injured against joint tortfeasors is one and indivisible. Three conclusions resulted therefrom (a) release given by the injured to one tortfeasor, released the other tortfeasors (hereinafter "the first thesis") (b) judgement given pursuant to a claim of the injured against one tortfeasor, according to which that tortfeasor was found liable, constituted res judicata in any additional claim of the injured against another tortfeasor, who has not been a party to the first claim. Pursuant to judgement, the cause of action of the claim was merged in the judgement and the judgement reflects the cause of action. Since there is only one cause of action, an additional claim against another tortfeasor cannot

be sustained. ("second thesis"); (C) judgement given in the claim of the injured against one tortfeasor, according to which the tortfeasor was released from liability, constitute, *apparently,* estoppel to the filing of an additional claim against another tortfeasor, who was not a party to the first claim. The failure of the claim of the injured negated the existence of the cause of action and as a result thereof, the second tortfeasor can avail himself of the estoppel resulting from res judicata ("third thesis")";

d) (1) As regards the first thesis, a distinction was made by the authorities in England between:—

(aa) Release, the effect of which was discharge of the claim or obligation. The release destroys the cause of action. Consequently, release given between joint tortfeasor (A) destroys the cause of action against all other joint tortfeasors (B); and—

(bb) Covenant not to sue. As opposed to a release a covenant not to sue does not destroy the cause of action and, consequently, a covenant made with one joint tortfeasor (A) does not bar the injured party from sueing the other joint tortfeasors (B);

(2) (aa) "The agreement evidenced by the letter to the solicitors for the association, followed by satisfaction, operated as a release by way of accord and satifsaction,

as distinct from a covenant not to sue, because the letter was expressed as a release and there was nothing that expressed a reservation of rights so as to show an intention that there should not be a release; and in law the release extinguished the plaintiffs' claim in respect of the separate tort alleged to have been committed by the defendant in causing his letter to be published in the journal". (Cutler vs. McPhail 1962/2 All England Law Reports page 474);

(bb) "A rule of construction for such a document was laid down . . in the case of . . where it was held that in determining whether a document be a release or a covenant not to sue, the intention of the parties is to be carried out, and if it were clear that the right against a joint debyor was intended to be preserved—the proper construction was that it was a covenant not to sue and not a release" (Duck v. Mayue (1892) 2QB, page 511 on page 514);

e) "The established rule of the English Common Law was, and is still today, that release given by the injured to one out of more joint tortfeasors, releases also all other tortfeasors, since the release discharges the cause of action. This is not so in case of a covenant not to sue. Such an agreement leaves the cause of action in existence, and, there-

fore, does not affect the cause of action itself." (Tedeschi Supra para. 289(3), page 491);

f) (1) The rules under the 2nd and 3rd theses were altered in England by Statutory Law, i.e. by Art. 6(1)(a) of the Law Reform (Married Women and Tortfeasors) Act, 1935 (hereinafter "THE ENGLISH 1935 ACT"). It was provided therein that judgement recovered against one join tortfeasor, shall not be a bar to an action against any other joint wrongdoer;

(2) As regards the rules under the first thesis, same remained unaltered and have been consistently followed by all English precedents as set forth above;

g) (1) Israeli Law and juriprudence followed, with slight deviations the English rules, as outlined above;

(2) As regards the first thesis, the Law of Torts does not contain any statutory provision. In view of this, the English Common Law Rules were, rather consistently, followed;

(3) As regards the second and third theses, the Law of Torts contains a provision almost identical with that of the English 1935 Act. Art. 83a) of the Law of Torts reads as follows: "Where damage is suffered by any person as a result of a civil wrong, judgement recovered against a civil wrongdoer liable in respect of that damage shall not be a bar to an action against any other person, who would, if sued,

have been liable as a joint civil wrongdoer in respect of the same damage";

(4) The identity of the English and Israeli Law on the above points was emphasised in Zucker v. Leibowitz, Civil Appeals 49/63 (given on 13.2.64), Supreme Court Judgements, Volume 18/I, 1964, page 344: "What does each Law say in this matter? Joint tortfeasors are dealt with in Art. 10 of the Ordinance (Art. 11 of the New Version). The essence of the Art. is only a repetition of the English rule that joint tortfeasors are jointly and severally liable .... The matter of joint tortfeasors is dealt with also in Art. 64(1)(a) of the Ordinance (Art. 83a) of the New Version), which is only a reproduction of Art. 6(1)(a) of the English Law of 1935";

h) (1) As regards the first thesis, the Israeli Courts followed consistently the principles of the English Common Law, namely that the release of one joint tortfeasor releases all other joint tortfeasors. This principle was based on the "single and individual cause of action";

(2) The following precedents illustrate the Israel legal situation on this point:—

(aa) (i) "The only question which remains is whether this compromise (the compromise made by the injured party) does release also the other respondents (tortfeasors). There is no doubt that if the principles appli-

cable to this question are the principles of the English Common Law, this compromise releases all tortfeasors";

(ii) "Held. The principles of the English Common Law are applicable to the question whether a compromise by the injured party with one of the tortfeasors releases also the others;

(iii) Shaltey v. Kanterowitz, Civil Appeal 203/54, Supreme Court Judgements, Volume 9, 1955, page 559;

(bb) "It is clear . . . that pursuant to settlement of the claims for damages of respondent (the insurer of the driver of the bus) the driver of the bus himself (appellant no. 1) is also released from all liability in respect of the damage caused to them . . . . Civil Appeal 203/54, Shaltey v. Kanterowitz, Supreme Court Judgements, Vol. 9, page 559". (This judgement was given by Chief Justice Agranat. Bassat v. Caledonian, Supreme Court Judgements, Vol. 18/I, 1964, page 538);

(cc) "The leading rule in this matter, in which precedents are rather rare, was put forward by J. Salmon in Cutler v. McPhail (1962) 2 All E.R. 474, 476 as follows: "The principle is quite plain, that, if there

is a release of one joint tortfeasor, the cause of action against all the tortfeasors is extinguished; on the other hand, if there is merely an agreement not to sue one of several joint tortfeasors, the cause of action does not die and the other tortfeasors can properly be sued". Civil Case Jerusalem 306/68, District Court Judgements, 1969, page 186.

(dd) "Held. The release of one tortfeasor out of more joint tortfeasors does not release the others, if it is expressly so stated and in particular, if the intention is a covenant not to sue one tortfeasor, whereas such right is reserved towards the other tortfeasors" (Friedman v. Segal, Civil Appeal 30/72, Supreme Court Judgements 27/2, 1973, page 225);

(ee) Judge Raveh, of the District Court of Tel Aviv, gave a rather recent judgment in the State of Israel v. Stoller (4.2.75) in Civil Case Tel Aviv No. 794/71, translation in English of which is attached hereto (Appendix "D"). This Judgement reviews all authorities relating to the effect of the release of one joint tortfeasor, on the liability of the others and confirms the standard practice as quoted above;

i) (1) As regards this point, the question is whether the LMK Deeds of Release are Deeds of Re-

lease proper or must be considered only as covenants not to sue. This is a problem of interpretation of the LMK Deeds of Release;

(2) (aa) The relevant rule was laid down in Duck v. Mayue (1892) 2.Q.B. 511;

(bb) "A rule of construction for such a document was laid down by the Court of Queen's Bench in Price v. Barker, (10), where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release" (page 514;

(cc) The above quotation was cited by approval in Friedman v. Segal (Supra) page 234;

(3) (aa) As between LMK, on the one part, and SP, on the other part, the LMK Deeds of Release are res inter alios acta;

(bb) In view of this fact, two interesting legal questions arise, namely:—

(i) Should the LMK Deeds of Release, as between SP and LMK, be inter-

preted according to their literal wording, or could the contents of same be supplemented with the intention of the parties, ie. IAI and LMK, if such intention is not expressed;

(ii) What is the legal situation if at the time of execution of the Deeds of Release the point of whether LMK shall or shall not reserve their right to sue other tortfeasors (ie. SP) was not dealt with within the Deeds of Release itself?;

(iii) Can the LMK Deeds of Release be supplemented with an implied condition, to the effect that the intention of the parties to the Deeds of Release was that LMK reserves their right to sue other tortfeasors?

(iv) What is the effect of the additional agreement entered into in 1972 in relation to this question? If the right of LMK to sue other tortfeasors was not reserved, can this position be remedied by a subsequent agreement between IAI and LMK?;

(4) (aa) As regards the first question. Upon reading of the text of the LMK Deeds of Release and based upon such reading only, can an intention of the parties (LMK and IAI) be derived from the Deeds of Re-

lease to the effect that LMK reserve their right to sue other tortfeasors?;

(bb) The following arguments plead in favour of the submission that the LMK Deeds of Release should be constructed as covenants not to sue, and not as Deeds of Release proper, viz:-

(i) Arts. 1, 3 and 4 of the Landau Deed of Release, Art. 1, 3 and 4 of the Muskatel Deed of Release and Arts. 1 and 3 of the Koren Deed of Release do mention by name only IAI and the Ministry of Defense;

(ii) The additional agreement entered into in 1972 supports the allegation that, had IAI and LMK dealt with the problem within the Deeds of Release themselves, then the question of LMK's claims against SP, would have been reserved in the LMK Deeds of Release;

(cc) The arguments which plead for considering the LMK Deeds of Release as Deeds of Release proper and not as covenants not to sue, are:-

(i) The title of the Deeds of Release: "Deed of Release and Full and Final Accord";

(ii) Art. 2 of all Deeds of Release: "The amounts specified above include

full, final and complete satisfaction of all damages and/or losses of any kind or nature, which have been caused to me, and/or may be caused to me at any time, both directly and indirectly, as a result of the said accident", without limiting the statements therein contained to IAI and/or the Ministry of Defence;

(iii) Absence of any express provision to the effect that the rights of LMK against other tortfeasors are reserved;

(5) As regards the second question, the Court, by interpreting the Deeds of Release is at liberty, based upon the express wording of the LMK Deeds of Release, and especially on the arguments mentioned in 3(bb) above, to come to the conclusion that the intention of the parties was experssed. Of course, by the same token, the Courts are at liberty to come to a contrary conclusion especially based upon the arguments set forth in (3) (cc) above;

(6) (i) As regards the third question as to whether the Court can, by way of interpretation of the presumed intention of the parties, include in the LMK Deeds of Release an implied condition, to the effect that the parties (IAI and LMK) reserve the right of LMK to sue other tortfeasors, I refer to my remarks relating to

"implied conditions" as set forth in detail in Art. 16 below;

(ii) This question is further complicated by an additional question. Does the additional agreement reflect the existing or presumed original intention of the parties (IAI and LMK) expressed in the LMK Deeds of Release, or does the additional agreement constitute an alteration and change of the original intention? If it did so alter, is such alteration effective as between LMK and SP?;

(iii) In both cases, it is up to the Court to decide, based upon either the Deeds of Release only, or upon additional extrinsic evidence to be collected, to the extent such evidence will be found admissable by the Court;

j) (1) Based upon Zucker v. Leibowitz (Supra), which stated that as regards the second and the third theses (judgement recovered) the single and indivisible cause of action principle does not apply, Tedeschi (Supra) tried to apply the Zucker v. Leibowitz principle also to the first thesis, ie. to the effect of the release of one tortfeasor on the liability of other tortfeas :s;

(2) But, the Courts did not adopt the position advocated by Tedeschi (Supra). The Zucker v. Leibowitz Case was decided on 13.2.64. Supreme Court Justice Landau, who is one of the Judges who gave the judgement in the Zucker v. Leib-

owitz Case, was also on the bench in the Friedman v. Segal Case, which was given on 30.5.73, ie. much later than the Zucker v. Leibowitz Case. As pointed out above, the Friedman v. Segal Case reconfirmed again the first thesis, as stated in the English Common Law.

14. a) On the assumption that the LMK Deeds of Release are not to be considered Deeds of Release, but covenants not to sue, the question arises whether LMK can in law recover from IAI, indirectly through the intermedium of SP by filing action against SP, the IAI contribution, which they can not have recovered, had they filed action directly against IAI;

b) My answer to this question is in the negative, on a long series of legal grounds, as set forth below;

c) But, before I will expose the legal grounds sustaining my negative answer, it is desirable to quote the relevant passages of the LMK Deeds of Release:—

(1) "I have received from IAI the amount of IL. 75,000 in complete and final and full settlement of all my claims and demands against IAI and/or the Ministry of Defence, in respect of everything, directly or indirectly, connected with or resulting from the accident of the abovementioned aircraft accident. . . ." (hereinafter "THE FIRST PROVISION" (See Art. 1 of the LMK Deeds of Release, the language of which is almost identical in all three Deeds of Release);

(2) "The amount specified above includes full, final and complete satisfaction of all damages and/or losses of any kind or nature which have

been caused to me and/or may be caused to me at any time, both directly and indirectly, as a result of the said accident" (hereinafter "THE SECOND PROVISION") (See Art. 2 of the LMK Deeds of Release, the language of which is almost identical in all three Deeds of Release);

(3) "In consideration of the receipt of the amount, I herewith waive all my claims and demands and contentions . . . in connection with the damages and/or losses resulting from the said accident and I hereby release IAI and/or the Ministry of Defence and/or anyone of them and/or any other person or legal body in their name and/or in their stead, from any responsibility and/or liability whatsoever in connection with the said accident." (hereinafter "THE THIRD PROVISION) (See Art. 3 of the LMK Deeds of Release, the language of which is almost identical in all three Deeds of Release);

(4) "I hereby declare and confirm that: Neither I nor any person and/or any legal entity in my name and/or in my stead, have and will have, any demands, contentions or claims against IAI and/or the Ministry of Defence and/or any one of them and/or any other person, and/or legal entity in their name and/or in their stead, in respect of the said accident and/or everything connected therewith, and/or resulting therefrom, directly or indirectly, including claims under the Law Amending the Civil Torts Law (Reparation for Bodily Damages) 1964" (hereinafter "THE FOURTH PRO-

VISION") (See Art. 4 of the LMK Deeds of Release, the language of which is subject to my marks in (5) below, almost identical in all three Deeds of Release), except that the last sentence referring to the Law Amending the Civil Torts Law (Reparation for Bodily Damages is not included in the Muskatel Deed of Release;

(5) (aa) Art. 4, last sentence of the Landau Deed of Release, contains the following additional provision (hereinafter "THE LANDAU INDEMNITY PROVISION"): "and I undertake to indemnify the recipient of the claim or demand, should a claim be made against him by any person or body for any payment borne by him due to the above accident, up to the amount of IL.75,000";

(bb) Art. 5 of the Koren Deed of Release (last sentence) contains the following additional provision, (hereinafter "THE KOREN INDEMNITY PROVISION"): "And I undertake to indemnify the recipient of the claim or demand, should any claim be made against him by any person or body, against any payment which will be borne by him pursuant to the said accident";

(cc) The Muskatel Deed of Release does not contain a similar indemnity provision.

15. a) The express provisions contained in the LMK Deeds of Release and the correct interpretation

thereof lead to the clear conclusion that LMK cannot claim the IAI contribution, neither:—

(1) From IAI directly; nor—

(2) From SP directly; nor—

(3) From IAI indirectly, through the intermedium of SP;

b) (1) The third provision states expressly that: "... I hereby release IAI ... and/or *any other* person or *legal body* ... *in their stead,* from any responsibility and/or liability whatsoever in connection with the said accident";

(2) 65% compensation awarded or to be awarded against SP, represents the IAI contribution. If the IAI contribution is paid by SP to LMK, as a matter of fact such payment would constitute a payment by SP in the stead of IAI;

(3) But, as between LMK and IAI, LMK undertook, not to demand payment from any other person or body in the stead of IAI, that means that LMK undertook not to claim from SP, in the stead of IAI, the IAI contribution. The purpose of this provision is clear: As between IAI and LMK, to relieve IAI from any further payment in connection with the accident;

(4) Claim by LMK from SP of the IAI contribution, means therefore a breach of the express undertakings contained in the third provision;

c) (1) The claim of LMK against SP for the payment of the IAI contribution is (as far as IAI is

concerned) a claim directly or indirectly connected with or resulting from the accident for which ultimately IAI is responsible;

(2) The claim by LMK against SP of the IAI contribution constitutes also a violation of the provisions of the first provision, the purpose of which was also to protect IAI against any demands *"in respect of everything, directly or indirectly connected with or resulting from the accident"*;

d) (1) Under the fourth provision LMK expressly undertook and warranted that neither they nor any person and/or legal entity will, in their stead, have any claim against IAI in respect of the said accident and/or anything connected therewith or resulting therefrom;

(2) Claim by SP against IAI of payment of the IAI contribution constitutes a claim against IAI in the stead of LMK;

(3) Claim by SP from IAI of reimbursement of the IAI contribution constitutes a violation of the fourth provision, the purpose of which obviously was to protect IAI against the possibility of such a claim;

e) (1) As mentioned above:—

(aa) The Landau Indemnity Provision limits the indemnity liability of Landau to IL.75,000 (See Art. 4 of the Landau Deed of Release);

(bb) The Koren Indemnity Provision is unlimited (See Art. 4 of the Koren Deed of Release);

(cc) The Muskatel Deed of Release does not contain any undertaking to indemnify IAI;

(2) The question arises whether the above indemnity provisions, or lack of indemnity provision, do or do not affect the liability of IAI to pay the IAI contribution to SP and through SP to LMK;

(3) The answer to this question is in the negative;

(aa) The first provision, the second provision, the third provision, the fourth provision in the Muskatel and Koren Deeds of Release and the first part of the fourth provision of the Landau Deed of Release, are coached in the widest possible language and constitute a clear undertaking that in conection with the accident, no ultimate liability whatsoever, directly or indirectly connected with or resulting from the accident shall rest upon IAI, except the amounts paid to LMK and the conditions of further employment agreed with them thereunder;

(bb) Nor does the fact that the Landau Indemnity Provision is limited to IL.75,000 mean that Landau becomes entitled to, and may benefit from, the monies of the IAI contribution in excess of IL.75,000;

(cc) (i) The Landau Indemnity Provision refers to "The Law Amending the Civil Torts Law (Reparation for

Bodily Damages), 1964". The correct title of this Law is: "Law of Torts Amendment (Repair of Bodily Harm), 1964" (hereinafter "THE BODILY HARM LAW");

(ii) Art. 1 of the Bodily Harm Law reads as follows: " 'Repair of harm' means expenditure incurred or a service rendered in order to repair bodily harm, preserve the victim from aggravation of the harm or from further harm or relieve his suffering and includes such assistance given to the victim towards his maintenance or the maintenance of his family as he needs as a result of the harm and, where the victim has died, assistance as aforesaid given to a person entitled to compensation from the tortfeasor in respect of the victim's death; 'bodily harm' includes illness, a bodily or mental defect, and death";

(iii) Art. 2 of the Bodily Harm Law reads as follows: "Where a person has caused bodily harm to another person, a person who repairs the harm may recover such repair from the tortfeasor up to the amount which the tortfeasor would have had to pay to the beneficiary, under any law, for causing the harm if the

harm had not been repaired by the repairor";

(iv) The Landau Indemnity Provision must be read in conjunction with and related to the passage making reference to the Bodily Harm Law;

(dd) (i) Under the Landau Indemnity Provision, Landau undertakes to indemnify IAI (the recipient of the claim) against any claim or demand, should a claim be made against IAI, due to the above accident, up to the amount of IL.75,000;

(ii) Any claim? Obviously not. Any claim cannot mean a claim for damages of any other person injured due to the accident, if Landau was not himself responsible for such claim. Such a wide interpretation of the words "any claim" would lead to patent absurdity;

(iii) If so, when does the obligation of Landau to indemnify IAI arise? Indemnify against what kind of claims or demands which might be made against IAI? Obviously, the intention is that Landau shall indemnify IAI only in respect of such claims, for which, but for payment by IAI, Landau himself would be liable. There must exist a *debt of*

Landau paid by IAI, as a condition precedent for the liability of Landau to indemnify. In the absence of a *debt of Landau,* no payment by IAI will justify a liability to indemnify by Landau;

(iv) Under the Bodily Harm Law, any person repairing or mitigating a bodily harm is entitled to compensation directly from the tortfeasor. Hospitalization, transportation and other expenses, even maintenance of the family, can be claimed by the repairor of harm directly from the tortfeasor, ie. from IAI. I was informed by IAI that the substantial amounts of such expenses have actually been paid by IAI;

(v) In order to protect IAI against future claims, for which but for the Repair of Harm Law, Landau himself would have been responsible, an indemnity clause coached in the terms of the Landau Indemnity Provision is generally included in Deed of Release forms;

(vi) The limitation of IL.75,000 only means that, if claims for which Landau is the ultimately liable person, would be made against IAI in excess of IL.75,000, such excess shall be borne by IAI, whilst in respect

of any amount below the limit of IL.75,000, IAI shall be indemnified by Landau;

(vii) The Landau Indemnity Provision is destined to protect IAI against *debts of Landau,* paid or payable by IAI, *not against claims of Landau,* which might be made by Landau. The Landau Indemnity Provision presupposes and is based upon a situation where Landau is a "would-be debtor" and not a "would-be creditor". To link the limitation of IL.75,000 to a *claim by Landau* against other tortfeasors leads to nonsense and absurdity. These considerations apply equally to Muskatel and Koren;

(4) But, the problem of the effect of the Landau Indemnity Provision, may be approached also from another angle, which leads to the same negative conclusion:—

(aa) The limitation of IL.75,000 protecting Landau gainst an indemnity liability towards IAI in excess of that sum, comes into operation, and *is effective only if the indemnity liability of Landau is caused by the act or action of a third person, not by an act or action of Landau himself;*

(bb) (i) But, if the indemnity liability is brought about by the act of Landau himself (breach of contract, tort or

otherwise) the indemnity liability is unlimited;

(ii) Under the Landau Deed of Release Landau released IAI from any liability, waived any claim against IAI and undertook a warranty to the effect that no person will have a claim against IAI in connection with the accident, *directly or indirectly,* by trying to enforce the judgement in the USA Case against SP, also in respect of the IAI contribution, in lieu of limiting his claim to 35%, Landau tries to collect from IAI indirectly, what he couldn't collect from IAI directly, having regard to the provisions of the Landau Deed of Release;

(iii) The result would be that Landau would use his own breach of contract and/or his own tortious acts, in order to take advantage of the limitation of liability contained in the Landau Deed of Release. In law, such course is inadmissible;

(cc) (i) 'NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA. (Co. Litt. 148b)—No man can take advantage of his own wrong. It is a maxim of law recognised and established, that no man shall take advantage of his own wrong; and this maxim which is

based on elementary principles, is fully recognised in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases; and, in the first place, we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law." "(c) Per Ld. Abinger in Findon v. Parker, 11 M. & W. 675, at p. 680; Daly v. Thompson, 10 Id. 309; Malins v. Freeman, 4 Bing. N.C. 395, at p. 399; per Best, J., in Doe d. Bryan v. Bancks, 4B & Ald. 401, at p. 409; Co. Litt. 1, 48b; Jenk, Cent. 209; 2 Inst. 713; D.50, 17, 134, para 1. It "is contrary to all legal principle" that "the plaintiff can take advantage of his own wrong" (per Willes, J., in Ames v. Waterlow, L.R.5 C.P. 53, at p. 55). See also Dean of Christchurch v. Buckingham, 17 C B. N. S. 391. (d) 1 Hale, P.C. 482. (e) 2 Hale, P.C. 386 (Broom's Legal Maxims, 10 Edition, pg. 191);

(ii) "It is contrary to justice that a party should avoid his own contract by his own wrong. Accordingly, "in

a long series of decisions the Courts have construed clauses of forfeiture in leases, declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they shall be voidable only at the option of the lessors. The same rule of construction has been applied to other contracts, where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract" "(1) Davenport v. R., 3 App. Cas. 115, at pp. 128, 129. See the authorities there cited; also Quesnel Forks Gold Mining Co. v. Ward, (1919) W.N. 286; R. v. Paulson (1921) (1A.C. ¶271, at p. 277" (See Broom's (Supra) page 192);

(iii) ". . . we may state the principle upon which that Court invariably acted, namely—that the author of wrong, who has put a person in a position in which he has no right to put him, shall not take advantage of his own illegal acts, or, in other words, shall not avail himself of his own wrong" "(o) Per Ld. Cottenham in Hawkins v. Hall, 4 My, & Cr. 280" (See Broom's (Supra) page 196). This is exactly what

Landau tried to do. He tries to put IAI in a position in which he has no right to put IAI, namely to pay to him indirectly through SP, damages in addition to those stated in the Landau Deed of Release;

(iv) "Further, we may remark that the maxim which precludes a man from taking advantage of his own wrong is, in principle, closely allied to the maxim, ex dolo malo non oritur actio, which is likewise of general application, and will be treated of hereafter in Chapter IX. The latter maxim is, indeed, included in that above noticed; for it is clear, that since a man cannot be permitted to take advantage of his own wrong, he will not be allowed to found a claim upon his own iniquity: nemo ex proprio dolo consequitur actionem; and as before observed, frustra legis auxilium quoerit qui in legem committit (g). The following cases also illustrate that the maxim, that a man shall not be permitted to take advantage of his own wrong or default; respecting the right to costs, Pope v. Fleming, 5 Exch. 249; the enrolment of memorial of an annuity, Molton v. Camroux, 4 Exch. 17; an action against the sherrif for an escape, Arden v.

Goodacre, 11 C.B. 371, at p. 377". (See Broom's (Supra) page 198);

(v) "In Hooper v. Lane (o), which strikingly illustrates the rule that "no man shall take ad advantage of his own wrong," various instances were put by Bramwell, B. (p) showing that the rule "only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed". "(o) 6 H.L. Cas. 443; see Ockford v. Freston, and Chapman v. Freston, 6 H. & N. 466, at pp. 472, 480, 481." (See Broom's (Supra) page 199);

(vi) "In the first place, then, we may observe that the word dolus, when used in its more comprehensive sense, was understood by the Roman jurists to include "every intentional misrepresentation of the truth made to induce another to perform an act which he would not else have undertaken" (b), and a marked distinction accordingly existed in the civil law between dolus bonus and dolus malus: the former signifying that degree of artfice or dexterity which a person might lawfully employ to advance his own interest, in self-defence against an enemy or for

some other justifiable purpose (c); and the latter including every kind of craft, guile, or machination, intentionally employed for the purpose of deception, cheating or circumvention". "(b) Mackeld. Civ. Law, 165. (c) Mackeld. Civ. Law, 165; Bell, Dict. and Dig, of Scots Law, 319; D.4, 3,3; Brisson ad verb. "Dolus"; Tayl. Civ. Law 4th ed. 118." (See Broom's (Supra) page 498); Claiming from SP payment of the IAI contribution, LMK is the kind of *craft, machination, intentionally employed for circumventing the provisions of the LMK Deeds of Release;*

(vii) ". . . and it was observed by Wilmot, C.J., delivering the judgement of the Court, that "the manner of the transaction was to gild over and conceal the truth; and whenever Courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish and show the transactions in their true light." "No polluted hand shall touch the pure fountains of justice" "(n) See, also, Prole v. Wiggins, 3 Bing. N.C. 230, Paxton v. Popham, 9 East, 408; Pole v. Harrobin, ID. 416, n.; Gas Light Co. v. Turner, 5 Bing. N.C. 666, and

6 Id. 324; Cuthbert v. Haley, 8 T.R. 390" (See Broom's (Supra) page 499, 500);

(viii) It is an indisputable proposition that, as against an innocent party, no man shall set up his own iniquity as a defence, any more than as a cause of action;

(dd) The remarks specifically made in connection with the Landau Deed of Release apply equally, mutatis mutandis, also to Muskatel and Koren;

f) The "hypothetic law suit" test referred to in 12e(4) above, should also be applied in interpreting the express provisions of the LMK Deeds of Release. What judgement would be given by the Court, if LMK would have filed action not only against SP, but both against SP and against IAI?;

g) The result of the above breaches of contract is that:—

(1) LMK are not entitled to claim from SP damages, which include the IAI contribution, and that such claim must be reduced with the amount of the IAI contribution;

(2) LMK are obliged to reduce their claim against SP with the amount of the IAI contribution;

(3) Should LMK collect from SP the full amount of damages, including the IAI contribution, they would be obliged to reimburse IAI the amount of the IAI contribution;

h) But, as mentioned below, LMK should be prevented from collecting the IAI contribution also on the quasi-contractual ground of "unjust enrichment" and/or tortious fraud. On this point see detailed opinion contained below.

16. a) The careful reading of the LMK Deeds of Release, leads to the conclusion that the LMK Deeds of Release shall be interpreted as including an "implied condition" (implied term) to the effect that, under no circumstances whatsoever shall IAI, in addition to the amounts paid under the LMK Deeds of Release and its other undertakings thereunder, become liable to pay any amount in connection with the accident, the ultimate beneficiary of which would be LMK or any of them;

b) The doctrine of "implied condition" is part and parcel of Israeli Law, both in the post-period and the ante-period;

c) (1) The meaning of "implied condition", "implied term" and "implied warranty", can be gathered from the authorities quoted below;

(2) (aa) "But, there is no doubt that there exist successes where the Court must not refrain from interpreting contracts as including implied conditions, although these cases should be exceptional . . ." (See page 751 of the judgment in (ff) below);

(bb) "In order that I shall be able to explain my position, I consider it convenient first of all to define the substance of an im-

plied condition. I cannot do better than by quoting the well-known dicta of Chief Justice Bowen in the Moorcock Judgement, All ELR, Reprint 1886-1890, page 530". "Now an implied warranty, or as it is called a covenant in law, as distinguished from an express contract or express warranty, really is in every instance founded on the presumed intention of the parties and upon reason. It is the implication which the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either of the parties. . . . the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended it should have . . . ." (See page 751 of Judgement in (ff) below);

(cc) "It happens that the Court adds to the conditions of contract and "implied condition", in order to find a solution to the dispute in respect of which nothing is said in the contract . . . . after the parties have signed a written contract they are presumed to have included in the contract everything agreed between them and no obligations should be added to those expressly stated in the contract . . . . only seldom, where the transaction as ex-

pressed lacks commercial purpose, may the above presumption be rebutted, allowing him to say: "It is impossible that this was the intention of the parties". (See 749 of the Judgement in (ff) below);

(dd) "The test of "the officious bystander" adopted in England in Shirlaw v. Southern Foundries (1939), 160 L.T. 353, 358 was referred to also: "The gist of the test is that the parties negotiating a contract would have answered to an officious bystander interfering in the discussions and making them a suggestion relating to a condition in the contract, would have answered to him: Nonsense." (See page 749 of the Judgement in (ff) below;

(ee) ". . . . in the end who is the "officious bystander", if not the Judges themselves. The Courts are creating for themselves, everybody according to his understanding, a reasonable man whom they put in a fictitious manner in the position of making an agreement between the parties and are asking him to testify as to what has been the intention of the parties at the time of the execution of the contract . . . . consequently, we are compelled to address ourselves to that creature whom the legislator and the Courts know as "the reasonable man", and to attribute to the contracting parties the qualities of such man . . . ." (See page 752 of the Judgement in (ff) below);

(ff) See Bamayor v. Comedy Theatre, Civil Appeal 131/71, Supreme Court Judgements Volume 25/II, 1971;

(3) (aa) "Perhaps the best thing to do is to put forward the picturesque test of Judge Mackinnon (my remark: The so-called test of the "officious bystander) that every Judge who has to decide that an agreement depends on a certain condition which was not mentioned in same expressly, may arrive at such conclusion if he can imagine to himself that if a foreigner would have stood by the parties, when they have made an agreement between them, and had proposed to them to include in the agreement the respective condition, the parties have dismissed him with manifest impatience and would have said that this goes without saying". To mean, to such an extent (my remark) that the condition is so obvious that it is unnecessary to include same in the agreement . . . .";

(bb) The test of "officious bystander" referred to above was challenged by Bamayor v. Comedy Theatre (Supra), by applying the test of "the reasonable man". But, in essence, both tests lead to the same conclusion;

(cc) (See Cohen v. Wechselman, Civil Appeal No. 351/67, Supreme Court Judgements,

Volume 21/II, 1967 page 661, at page 666);

(4) (aa) The LMK Deeds of Release do not include an express article to the effect that LMK reserve their rights to damages against the other tortfeasors;

(bb) Court action against SP, the other tortfeasors, was taken by LMK only in 1972;

(5) It is admitted by IAI that IAI undertook to finance and advance the expenses connected with such Court action, under the conditions set forth in the additional agreement;

(6) Based upon the information received by me from IAI, in the additional agreement, it was agreed that in case of recovery by LMK of damages by SP, LMK will not only refund IAI the expenses advanced, *but even more, they will refund IAI the amounts received under the LMK Deeds of Release*;

d) (1) How does the implied condition doctrine apply to the instant case?;

(2) Let us assume that an "officious bystander" or a "reasonable man" would have been present at the negotiations between IAI and LMK, relating to the drafting of the LMK Deeds of Release and/or the additional agreement. Let us further assume that such officious bystander or reasonable man would have suggested to include in the LMK Deeds of Release and/or the additional agreement a provision to the effect that, in case of success against other

tortfeasors and obligation of contribution of IAI to such other tortfeasors LMK should be obligated either to refrain from claiming from the otner tortfeasors the IAI contribution, or in case of collection of same, they should be obligated to reimburse to IAI the amount of such contribution. Such officious bystander or reasonable man would have even exclaimed: You, IAI, by financing the US Case of LMK are "digging your own grave", since, defacto, you are financing a case not only against SP, but against your own self!" What would have been the reaction of all parties to such a remark? Obviously, they would have spontaneously retorted: Nonsense! Such a provision is not needed, since it is clear that in addition to the amounts stated in the LMK Deeds of Release, IAI can never find itself in a position to pay additional monies, the ultimate beneficiaries of which would be LMK. IAI paid LMK full consideration for its being released from any liability towards LMK resulting from the accident. *Any additional payment would constitute a payment for complete lack of consideration.*

17. a) The result of the above analysis is that:—

(1) LMK are obligated to refrain from collecting from SP the IAI contribution; or—

(2) If and to the extent such contribution is collected and reimbursed by IAI to SP, same must be reimbursed by LMK to IAI. There

applies the maxim "dolo petit, qui it petit quod rediturus est". He who claims what must be reimbursed, does claim fraudulently;

b) But, in addition to the above circumstances, the obligation of LMK not to collect the IAI contribution, or if collected to restitute same to IAI, maybe based also on:—

(1) "Constructive fraud" called also legal fraud under contract law;

(2) Fraud under the Law of Torts; and—

(3) The Quasi-contractual Law of Unjust Enrichment (money had and received, doctrine of restitution);

c) Since I understand that the US Court gave a short time limit for the submission of arguments in connection with the above problem, since the elaboration of the legal problems mentioned in b)(1), (2) and (3) above would be rather time-consuming, this opinion is split into two parts. The above problems will not be dealt with in detail in this opinion, but will be dealt with separately in an addendum to same.

18. Conclusion: LMK are not entitled to collect from SP the IAI contribution, in whole or in part, neither directly nor indirectly, through the intermedium of SP.

Tel Aviv 12.APR.1976

/s/ D. Hermann
(Dr. D. Hermann, Adv.)

Exhibit A Annexed to Foregoing Affidavit

Deed of Release and Full and Final Accord of Zohar Landau—Translation from Hebrew, dated January 20, 1971—printed above at pages 186a-188a.

Exhibit B Annexed to Foregoing Affidavit

Deed of Release and Full and Final Accord of Mordechai Muscatel—Translation from Hebrew, dated March 1, 1971—printed above at pages 189a-191a.

Exhibit C Annexed to Foregoing Affidavit

Deed of Release and Full and Final Accord of Hagai Koren—Translation from Hebrew, dated July 3, 1970—printed above at pages 192a-194a.

Exhibit D Annexed to Foregoing Affidavit

(Translation of Decision of Israeli Court)

K/201/3/1

TRANSLATION FROM HEBREW

The District Court of Tel Aviv/Yaffo

Civil Case No. 794/71
Motion No.

Applicants: 1. State of Israel
2. Raphael Frankel

Respondents: 1. Zipporah Stoller
2. Ezra Reuven
3. Guardian Eastern Co.

D E C I S I O N

Mrs. Stoller had an accident in the year 1967, whilst riding a motorcycle driven by Raphael Frankel. The Statement of Claim contends that the accident was caused by a car driven by Ezra Reuven. The Insurance Company of Ezra Reuven is the "Guardian Eastern Company". Reuven Frankel was a soldier and the claim was filed in the year 1971 against Reuven Frankel and the State of Israel. A medical opinion of Dr. Kidron dated 17.5.68 was attached to the Statement of Claim.

The claim is in the amount of IL.90,000.—.

In 1969 something happened, which is reflected in a document dated 10.11.69 entitled "Deed of Release and Final and Full Agreement". In this document Mrs. Stoller made a compromise with the Guardian Eastern Company and thereby, as a matter of course, also with Ezra Reuven, and

received the amount of IL.7,000.—. This fact is not reflected in the Statement of Claim filed against Reuven Frankel and the State, not even in the form of deducting from the amount of damages of IL.90,000.— the amount of IL.7,000 received by plaintiff.

Frankel and the State filed a motion to dismiss the claim filed against them in limine, based upon the compromise which, according to their opinion, constitutes what is called a release by way of accord and satisfaction (as distinguished from an agreement not to sue) which releases not only the direct parties to the agreement, but also all tortfeasors connected with that accident.

Mr Galili who appeared in the name of Frankel and the State relies on the precedents which state that a compromise of this type releases all wrongdoers. Adv. Giladi who appeared in the name of Ezra Reuven and the Guardian Eastern Company (upon whom third party notice was served on behalf of Frankel and the State with the purpose of obtaining indemnity) joins the contention, whilst Adv. Cohen, Attorney for plaintiff, contends that, even if the compromise constitutes release by way of settlement of the claims, the Israeli precedents do not accept the version as pleaded by his opponents. He further contends that the compromise constitutes only an undertaking not to sue. To my opinion, Adv. Galili correctly exposes the Israeli precedents. It is sufficient to refer in the subject matter to the judgement given in Civil Appeal 370/63, Supreme Court Judgement, Volume 18/I, page 533. On page 539 opposite to C-D-E Justice Agranat states as a matter which goes without saying the established ruling that "pursuant to settlement of the claims of the injured parties by respondents (the insurer of the driver of the

bus) also the driver of the truck is released from all obligations towards them in respect of the damage caused to them". He goes on and states that the Insurance Company of that truck driver is also relieved from any obligation, and refers to the precedents.

In opposition, Mr Cohen relies on Civil Appeal 49/63, Supreme Court Judgement, Volume 18/I, page 337. However, to my opinion, this judgement has got no relation whatsoever to the present question. There, the claim against one tortfeasor was dismissed, and it was decided that despite such dismissal, it is possible to file a claim against the other wrongdoer. It is sufficient to quote some of the precedents referred to on page 337, ie: "The difference between a judgement obliging a defendant to pay any compensation . . . for damages suffered as a result of a civil wrong and between a judgement dismissing the claim of plaintiff, even only due to lack of evidence, is not quantitative, but substantive. A judgement from the former class is based on positive findings in respect of the facts forming the cause of action of plaintiff according to the Civil Wrongs Ordinance, and even the assessment of the damages constitutes a positive finding. Whatever the amount of the assessment may be, large or small, in any case where a plaintiff succeeds to obtain judgement for the payment of compensation against one of the persons liable for the damage, the legislator found it appropriate, as to allow him to try to obtain a higher amount pursuant to a claim filed against the other persons responsible for his damage. This is the reason for the provision contained in Art. 64 (1)(b) of the Civil Wrongs Ordinance. This shall apply to any plaintiff who did not succeed at all to obtain judgement for the payment of compensation from the first defendant. And, it makes no

difference if his claim was dismissed because he did not prove the liability of defendant in torts, or, since he did not prove that damage was caused".

It results, therefore, that the question which was dealt with in that judgement was not the question of the meaning of any compromise, but as a matter of fact, problems of resudicata or estoppel were dealt with.

Mr Cohen relied further on Civil Appeal 30/72, Supreme Court Judgements Volume 27/II page 225. Again it is sufficient to quote some of the established rulings referred to on page 225. "The release of one out of joint tortfeasors does not entail the release of the others, if it is so expressly stated, in particular if an undertaking not to sue one of the wrongdoers is intended, whilst the right towards the other wrongdoers is preserved. An agreement not to sue one of the joint tortfeasors does not release the other tortfeasors, if it is clear that plaintiff intends to continue his claim against them".

Consequently, this is exactly the established rule pointed out by Adv. Galili. My sole function is to study the documents before me. In order to interpret same, and in my opinion the interpretation is unequivocal in the sense that in this compromise, a statement of the claims of the injured party by the Guardian Eastern Company is reflected. This is not an agreement not to sue the Guardian Eastern Company and its clients. This is, to my opinion, reflected in the most clear manner in Arts. 1 and 2 of the compromise, where it is said that plaintiff received from Guardian Eastern Company the amount of IL.7,000.— "in full, final and complete settlement of all my claims and demands, without any exception, in respect of everything connected

with and/or resulting from the aforesaid accident, directly or indirectly". Even stronger language is used in Art. 2: "The payment mentioned above includes full, final and complete coverage for all damages and losses which have been caused to me, are being caused to me and will be caused to me, to my body and property, at any time, as a result, both direct and indirect of the above accident. To avoid doubts, it is hereby expressly declared that the above amount includes hospitalization and medical expenses of all natures, both in the past and in the future."

I cannot imagine a stronger and clearer language showing that plaintiff received full satisfaction in respect of all the consequences of the accident, caused by whomever they have been caused, and there is not the slightest hint, that plaintiff reserves itself the right against anybody else.

I give importance also to Art. 4 of the document, which contains a declaration of plaintiff that no person or body has any claim or demand in respect of the accident or anything connected therewith, or resulting therefrom, and plaintiff even undertakes to indemnify the "person receiving the claim or demand, if a claim will be made against him by any person or body, for any payment which he shall bear due to the above accident". Art. 5 contains an additional declaration, that only based upon its acknowledgements and statements, did the Insurance Company agree to pay to her what it did pay, and these statements included also the declaration contained in Art. 4. The declaration in Art. 4 covers also the possibility that someone else will apply to the Insurance Company with a demand for indemnity.

To my opinion the document is unequivocal and the conclusion is also unequivocal.

Exhibit D—Translation of Decision of Israeli Court

By virtue of the precedents referred to in the above judgement, Civil Appeal 37/63, I find that plaintiff has got no cause of action whatsoever against Frankel and the State. Therefore, I dismiss the claim filed in File No. 749/71 in limine. (Remark: the other two paragraphs relate to the question of costs and expenses.)

Given today 4.2.75 in the presence of Adv. Cohen, Adv. Giladi and Adv. Galili, attornies for the parties.

.....

RAVEH, *Judge*

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Mary Ellen Young, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 146-35 61st. Road, Flushing, NY 11367. That on the 4th day of April, 1977 deponent served the within Appendix upon:

MENDES & MOUNT
Attorneys for Defendants-Appellees
STANDARD PRECISION
27 William Street
New York, NY 10005

FUCHSBERG & FUCHSBERG
Attorneys for Plaintiffs-Appellants
LANDAU, MUSCATEL and KOREN
250 Broadway
New York, NY 10007

the addresses designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office depository under the exclusive care and custody of the United States post office department within the State of New York.

Mary Ellen Young
Mary Ellen Young

Sworn to before me this
4th day of April, 1977.

Frank T. Genova, Jr.
Notary Public

FRANK T. GENOVA, JR.
NOTARY PUBLIC, State of New York
No. 41-6467175
Qualified in Queens County
Commission Expires March 30, 1978

MEILEN PRESS INC — N. Y. C. 219